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# Decisional Dignity: Teenage Abortion, Bypass Hearings and the Misuse of Law

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# DECISIONAL DIGNITY: TEENAGE ABORTION, BYPASS HEARINGS, AND THE MISUSE OF LAW

CAROL SANGER\*

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## I. INTRODUCTION

How might we think about reforming abortion regulation in a world in which the basic legality of abortion may, as a matter of constitutional law, at last be relatively secure? I have in mind the era just upon us in which the overturn of *Roe v. Wade*<sup>1</sup> no longer looms so threateningly over the reproductive rights community in the United States and is no longer necessarily its central concern. There is now a general and seemingly well-founded optimism that under the Obama administration, those who support and rely on reproductive rights will not have to pray nightly for the health of Supreme Court justices (although we wish them well). As Senator Obama said in 2008 on the 35th anniversary of *Roe*:

With one more vacancy on the Supreme Court, we could be looking at a majority hostile to a woman's fundamental right to choose for the first time since *Roe v. Wade*. The next president may be asked to nominate that Supreme Court justice. That is what is at stake in this election.<sup>2</sup>

It appears that since January 20, 2009, Justice Stevens may, if he wishes, hang out rather than hang on, and the rest of us may now be more confident that vacancies on the court are less likely to put the basic right to abortion in jeopardy. President Obama's first Supreme Court appointment, Sonia Sotomayor, characterized the Court's decision in *Planned*

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<sup>1</sup> 410 U.S. 113 (1973).

<sup>2</sup> Press Release, Barack Obama, Statement on 35th Anniversary of *Roe v. Wade* Decision (Jan. 22, 2008), [http://www.barackobama.com/2008/01/22/obama\\_statement\\_on\\_35th\\_annive.php](http://www.barackobama.com/2008/01/22/obama_statement_on_35th_annive.php).

*Parenthood vs. Casey* as “settled” and “the precedent of the court” during her confirmation hearings.<sup>3</sup> While confidence in a justice’s future decisions is never assured, it seems, for the moment anyway, that *Roe* will not be overturned.<sup>4</sup>

Despite the relief that flows from this greater sense of reproductive security, much legal work still needs to be done to secure healthier reproductive lives for women. Some of that work will remain constitutionally focused. Without the prospect of overturning *Roe* in the immediate future, pro-life legislators may focus ever more vigorously on whittling down women’s access to abortion through the targeted hyper-regulation of abortion provision, access, and consent.<sup>5</sup> Ever since the stingy affirmance of *Roe* in *Planned Parenthood v. Casey*,<sup>6</sup> the Supreme Court has affirmed the constitutionality of almost every regulatory requirement imposed by states on abortion patients, clinics, and doctors.<sup>7</sup> Constant vigilance over *Roe* may no longer be required, but lawyers still have plenty to do defending its current boundaries.

Yet constitutional advocacy is only part of the project for a pro-choice post-*Roe* agenda.<sup>8</sup> This Article considers the possibilities for statutory abortion reform and seeks to extend the audience to include

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<sup>3</sup> Charlie Savage, *Respecting Precedent, or Settled Law, Unless It’s Not Settled*, N.Y. TIMES, July 14, 2009, available at <http://www.nytimes.com/2009/07/15/us/politics/15abortion.html>.

<sup>4</sup> See, e.g., Charlie Savage, *On Sotomayor, Some Abortion Rights Backers Are Uneasy*, N.Y. TIMES, May 27, 2009, available at <http://www.nytimes.com/2009/05/28/us/politics/28abortion.html>.

<sup>5</sup> See generally Center for Reproductive Rights, Targeted Regulation of Abortion Providers (TRAP): Avoiding the TRAP (Nov. 1, 2007), <http://reproductiverights.org/en/document/targeted-regulation-of-abortion-providers-trap-avoiding-the-trap>.

<sup>6</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 879 (1992).

<sup>7</sup> As a Fourth Circuit judge observed in a South Carolina case, these burdensome regulations—“micromanaging everything from elevator safety to countertop varnish to the location of janitors’ closets”—have in a number of states “made abortions effectively unavailable, if not technically illegal.” *Greenville Women’s Clinic v. Comm’r, S.C. Dep’t of Health & Envtl. Control*, 317 F.3d 357, 371–72 (4th Cir. 2002) (King, J., dissenting) (upholding an elaborate set of state abortion regulations).

<sup>8</sup> See Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 YALE L.J. 1394, 1409–12 (2009) (arguing that the “court-generated rights discourse” has legitimated a minimalist state response to the problems of pregnant women).

legislatures in addition to courts. Are there arguments that have been obscured or overlooked in recent years but that, when brought more clearly to light, might appeal to those who enact statutes or to the citizens who vote for them? The possibilities for reform seem especially exciting right now. Not only has *Roe*'s reversal become less likely, but a number of Bush-era anti-abortion policies have already been countermanded by President Obama. These include the ban on aid to family planning programs abroad,<sup>9</sup> prohibitions on stem cell research,<sup>10</sup> and a last-minute conscientious objection opt-out for health care providers.<sup>11</sup> Once the subject of abortion is freed from the pervasive demonization expressed in the policies and politics of the last several years, we might be able to consider its regulation more reflectively.

Indeed, there have been recent signs that electorates, when more directly involved in reproductive issues, do not in every instance vote to make abortion less accessible. In November 2008, the voters of South Dakota rejected Measure 11, a comprehensive abortion ban;<sup>12</sup> Colorado voters rejected the Definition of Person Initiative, which would have defined a "person[]" as "any human being from the moment of fertilization";<sup>13</sup> and, importantly for the present discussion, Californians

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<sup>9</sup> See Rob Stein & Michael Shear, *Funding Restored to Groups that Perform Abortions, Other Care*, WASH. POST, Jan. 24, 2009, at A3.

<sup>10</sup> See Sheryl Gay Stolberg, *Obama Lifts Bush's Strict Limits on Stem Cell Research*, N.Y. TIMES, Mar. 10, 2009, available at <http://www.nytimes.com/2009/03/10/us/politics/10stem.html>.

<sup>11</sup> See Ricardo Alonso-Zaldivar, *Obama to Rescind Bush Abortion Rule*, WASH. POST, Feb. 28, 2009, at A1. There is also sensible movement in the area of sex education. See Sharon Jayson, *Obama Budget Shifts Money from Abstinence-only Sex Education; It's a major reversal from Bush's policies*, USA TODAY, May 12, 2009, at D4. Unreasonable restrictions in other areas, such as the ban on abortions for soldiers and dependents in military hospitals overseas, await reform. 10 U.S.C. § 1093(b) (2009) (forbidding elective abortions at medical treatment facilities run by the Department of Defense and ending Clinton's short-lived executive order, 58 Fed. Reg. 6439 (Jan. 22, 1993)).

<sup>12</sup> The vote was 55% to 45% against the measure. See S.D. Sec'y of State, Election Night Results (Nov. 12, 2008), <http://electionresults.sd.gov/applications/st25cers3/resultsSW.aspx?type=bq>.

<sup>13</sup> The vote was 73% to 27% against the initiative. *Election Results 2008: Colorado*, N.Y. TIMES, available at <http://elections.nytimes.com/2008/results/states/colorado.html>. The Initiative proposed to amend the constitution is as follows: "As used in sections 3, 6, and 25 of Article II of the state constitution, the terms 'person' or 'persons' shall include any human being from the moment of fertilization." Colorado Secretary of State, Amendment 48: Formerly Proposed Initiative #36, <http://www.elections.colorado.gov/Default.aspx?PageMenuID=1230> (last visited Oct. 1,

voted against Proposition 4, the Waiting Period and Parental Notice Before Termination of Minor's Pregnancy Initiative.<sup>14</sup> These developments suggest that now may be the time to take a breath, "dust ourselves off," in President Obama's inaugural phrase,<sup>15</sup> and consider anew the values and topics that constitute "talking about abortion."

What then might a public conversation about abortion look like—what topics might we collectively rethink—once the overturn of *Roe* is taken off the table? This article suggests a revision in the terms of the debate. As we know, supporters of legal abortion have long been on the linguistic defensive, as the vocabulary of "life" and "unborn children" has framed how people have come to think about abortion: what it is, whose interests are at stake, and whose are incidental.<sup>16</sup> There are, however, other concepts that might forcefully frame the discussion, I have in mind dignity and respect—concepts that in other legal contexts are taken quite seriously but that seem to have fallen to the side with regard to women in the context of abortion.

In putting the dignity of women on the table, I recognize that there is also ongoing discussion about the dignity of fetus, and that for some this is a source of opposition to abortion.<sup>17</sup> But the attribution of dignity to fetuses and embryos should not undermine the importance of securing dignity for women as they exercise their rights under existing law. Abortion is a legal medical procedure in the United States and legislation

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2009). See also Nicholas Riccardi, *Initiatives to Curb Abortions Defeated*, L.A. TIMES, Nov. 5, 2008, at A18.

<sup>14</sup> The vote was 52% to 48% against the proposal. League of Women Voters of California Education Fund, *Proposition 4*, <http://www.smartvoter.org/2008/11/04/ca/state/prop/4/> (last visited Oct. 1, 2009).

<sup>15</sup> Barack H. Obama, Presidential Inaugural Address (Jan. 20, 2009), <http://www.whitehouse.gov/blog/inaugural-address/>.

<sup>16</sup> For a discussion of the rhetorical advantages of "pro-life" over "pro-choice," see Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 806–07 (2006) [hereinafter Sanger, *Legislating in the Culture of Life*]. See generally CELESTE MICHELLE CONDIT, *DECODING ABORTION RHETORIC: THE COMMUNICATION OF SOCIAL CHANGE* (1994).

<sup>17</sup> See, e.g., ROBERT GEORGE & CHRISTOPHER TOLLEFSON, *EMBRYO: IN DEFENSE OF HUMAN LIFE* 105–09 (2008) (explaining that the destruction of embryos in the course of embryonic research is "an assault on human life" and "an assault on human dignity no matter the victim's age or size or stage of development"). Fetal dignity has also served as a basis for upholding abortion regulation. See *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (noting that the Partial Birth Abortion Act "expresses respect for the dignity of human life").

criminalizing it is constitutionally prohibited. Yet abortion regulation too often proceeds as though this were not quite the case. It is as though abortion's legality is somehow up for grabs and burdening women's dignity in each individual case remains fair game. I am particularly concerned with the use of *legal processes* in this enterprise, and therefore focus on the law's subversion of dignity in connection with a woman's decision to have an abortion. I take as my example a particular category of women—pregnant minors—and look at their treatment under a regulatory scheme known as the judicial bypass process. This is the requirement that teenagers who want to have an abortion without notifying or getting consent from their parents must first go to court and convince a judge that they are sufficiently mature and informed to make the decision themselves.

Much current legislation seems premised on the assumption that women—both young women and older ones—make decisions about abortion lightly, or impulsively, and that if only they were made to reflect just a bit longer and with a bit more information, they would change their minds. The “bit more” which legislators have sought to convey is a bundled set of propositions: that human life begins at conception, that an embryo or fetus at any stage of development is “a whole separate, unique, living human being”;<sup>18</sup> that women who abort will suffer emotional damage for the rest of their lives;<sup>19</sup> and that women must grasp all of this before they can consent to an abortion. This information is relayed through a variety of verbal and visual means including scripted physician disclosure statements, illustrated brochures of fetal development, and, most recently, the requirement that women undergo an ultrasound and “complete a required form to acknowledge that she either saw the ultrasound image of her unborn

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<sup>18</sup> For example, doctors in South Dakota must inform their abortion patients that abortion ends “the life of a whole, separate, unique, living human being.” S.D. CODIFIED LAWS § 34-23A-10.1(1) (b) (2008). See *Planned Parenthood of Minn., N.D., S.D., v. Rounds*, No. Civ. 05-4077-KES, 2009 WL 2600753, at \*2–3 (D.S.D. Aug. 20, 2009) (upholding the “Biological Disclosure” requirement). For two excellent critiques, see generally Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939 (2009) (focusing on the patient's obligation to listen) and Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939 (focusing on the physician's obligation to speak).

<sup>19</sup> S.D. TASK FORCE TO STUDY ABORTION, REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION 41–48 (2005), available at [http://www.voteyesforlife.com/docs/Task\\_Force\\_Report.pdf](http://www.voteyesforlife.com/docs/Task_Force_Report.pdf) [hereinafter S.D. TASK FORCE REPORT].

child or that she was offered the opportunity and rejected it” before consenting to an abortion.<sup>20</sup>

The discussion here is guided by a very different premise: that women, even young women, understand very well what an abortion is. Women understand that abortion ends pregnancy and that if they have an abortion, they will not have a baby; that is its very point. The significance of this decision may differ from woman to woman and girl to girl. In deciding whether or not to continue a pregnancy, each will draw upon her own sensibilities, circumstances, and beliefs. But I accept that, as with other deeply intimate decisions and commitments—who to marry, whether to pray, how to vote—women themselves are able and best positioned to decide what is at stake. Of course, leaving the choice to women does not mean that abortion decisions are “law-free.” Like other medical decisions and like the exercise of other constitutional rights (for abortion distinctively partakes of both), abortion decisions are certainly regulated and regulable by law. But there are also limiting principles as to *how* the law should intervene, and these include respecting the dignity of she who decides.

What exactly do I mean by dignity? The term has a variety of definitions and uses in constitutional law,<sup>21</sup> moral philosophy,<sup>22</sup> and in the theory and practice of human rights.<sup>23</sup> These share in common the general view that people “possess an intrinsic worth that should be recognized and respected,” and that they should not be subjected to treatment by the state that is inconsistent with their intrinsic worth.<sup>24</sup> Treatment that disrespects human dignity takes many forms, but it is the idea of dignity in connection with a decision to exercise a right in court that is my focus here. Specifically, what is the relation between the detailed regulation of abortion decisions and the right of women to be treated with dignity regarding such a decision? The question goes to the heart of what I call decisional dignity: the respect owed by law not only to the process of making an abortion

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<sup>20</sup> Woman’s Right to Know Act, ALA. CODE § 26.23A.4 (2009).

<sup>21</sup> See Gerald Neuman, *Human Dignity in the United States Constitution*, in ZUR AUTONOMIE DES INDIVIDUUMS 250 (Dieter Simon & Manfred Weiss eds., 2000) (presenting an historical and topical account of dignity in American constitutional law).

<sup>22</sup> See generally Michael J. Meyer, *Dignity, Rights, and Self-Control*, 99 ETHICS 520 (1989); Aurel Kolnai, *Dignity*, 51 PHIL. 251 (1976).

<sup>23</sup> For a good recent discussion of this topic, albeit somewhat skeptical in tone, see generally Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655 (2008).

<sup>24</sup> See Neuman, *supra* note 21, at 249–50.



decision but also to the decision itself once it has been made.<sup>25</sup> A woman who has decided to abort should not as a matter of law be subject to disrespectful, harassing, or punitive treatment by virtue of her decision.

Reva Siegel has shown that dignity offers a forceful basis for constitutional analysis.<sup>26</sup> But dignitarian concerns also appeal at a more instinctive level. There are times when we cannot help but notice that something in or about law seems to have gone wrong and that someone is being harmed—whether humiliated, disrespected, or punished—in ways that seem to put their dignity at stake. Frank Michelman noticed something like this in the early 1970s with regard to restrictions on poor people’s access to court in civil matters: “Perhaps there is something generally demeaning, humiliating, and infuriating about finding oneself in a dispute over legal rights and wrongs and being unable to uphold one’s own side of the case.”<sup>27</sup> At such moments, it is important to take a closer look at what is going on and to consider whether such harms are warranted or unfair, intended or incidental, and what exactly what law has to do with their imposition.

The aim of approaching the question in this way is to develop a broader conceptualization of the harms imposed by law on women who seek to end an unwanted pregnancy. Certainly much attention has been paid to the kinds of harm women suffer when they are unable to get abortions, or harms that were suffered in the pre-*Roe* days, when they were unable to get *legal* abortions.<sup>28</sup> Much attention has also been paid by the pro-life movement to what women suffer, or are said to suffer, by virtue of *having*

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<sup>25</sup> For a discussion of how certain abortion regulation improperly interferes with the decision-making process, see generally Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 (2008) [hereinafter Sanger, *Seeing and Believing*] (arguing that not only the right to decide about abortion, but the deliberative path taken to reaching a decision is protected).

<sup>26</sup> See generally Reva Siegel, *The Politics of Protection: A Movement History and Dignity Analysis of Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008). (showing how the Supreme Court’s commitment to women’s dignity implicates both substantive due process and equal protection). *But see* West, *supra* note 8 (discussing negative consequences of the court’s response).

<sup>27</sup> Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Own Rights, Part I*, 1973 DUKE L.J. 1153, 1174. In this article, Michelman explores four jurisprudential values that might have underpinned the Supreme Court’s decisions in three Fee Access cases of the early 1970s. These are dignity values, participation values, deterrence values, and effectuation values. *Id.*

<sup>28</sup> See generally RICKIE SOLINGER, *WAKE UP LITTLE SUSIE* (1992); LESLIE REAGAN, *WHEN ABORTION WAS A CRIME* (1998).

abortions, whether it is the now-discredited claims about breast cancer<sup>29</sup> or the promised range of emotional harms, such as guilt, depression, and suicide.<sup>30</sup>

There has, however, been little public discussion of the harms women suffer by virtue of abortion *regulation*, even when they are, in the end, able to obtain a legal abortion. A judicial determination that one or another regulation is constitutional (because, in the now familiar language of *Casey*, the regulation does not have “the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion”<sup>31</sup>) may not answer the question of whether a particular regulation has a harmful purpose or effect, whether or not it satisfies *Casey*. Even constitutional regulations may inflict objectionable harms on those who have no choice but to comply with them.

This Article considers the assault on the decisional dignity of young women through their participation in the judicial bypass process. Bypass hearings provide an instance where a woman’s decision and her dignity stand in special relation to one another. Other forms of abortion regulation, such as compulsory brochures, waiting periods, or mandatory ultrasounds, are often justified in terms of informed consent.<sup>32</sup> The idea is that, without particular information and sufficient time, a woman does not know enough to decide about abortion.<sup>33</sup> But bypass hearings work differently. While girls are typically questioned about their knowledge of abortion (details of

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<sup>29</sup> See House Comm. on Oversight & Gov’t Reform, Investigating the State of Science Under the Bush Administration: Breast Cancer Risks, [http://oversight.house.gov/features/politics\\_and\\_science/example\\_breast\\_cancer.htm](http://oversight.house.gov/features/politics_and_science/example_breast_cancer.htm) (last visited Oct. 1, 2009). In 2003, the NCI website was changed to report a major study that concluded that “having an abortion or miscarriage does not increase a woman’s subsequent risk of developing breast cancer.” National Cancer Institute, Abortion, Miscarriage, and Breast Cancer Risk, <http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage> (last visited Oct. 1, 2009).

<sup>30</sup> See Elizabeth Shadigian, *Reviewing the Evidence, Breaking the Silence: Long-term Physical and Psychological Health Consequences of Induced Abortion*, in *THE COST OF “CHOICE”: WOMEN EVALUATE THE IMPACT OF ABORTION* 63, 68–69 (Erika Bachiochi ed., 2004) (concluding on the basis of two studies, one Finnish, one U.S., that women have higher long-term rates of suicide and self-harm following abortion). See also S.D. TASK FORCE REPORT, *supra* note 19, at 33, 43, 50.

<sup>31</sup> *Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 877–78 (1992).

<sup>32</sup> In this regard, there has been a serious blurring by state legislators between medically informed consent and what might better be understood as “morally informed consent.” See Sanger, *Seeing and Believing*, *supra* note 25, at 397–403.

<sup>33</sup> See S.D. TASK FORCE REPORT, *supra* note 19, at 34–41.

the procedure, alternatives, possible consequences), the task before the judge is *not* to provide the petitioner with additional information. Rather, the judge is to assess whether the petitioner is mature and informed enough to credit the decision she has already made. The teenager's decision has occasioned the hearing in the first place; it takes place only after she has formally indicated her intention to end her pregnancy by petitioning the court. This structural relationship between decision and regulation gives us a chance to consider how the law affects not only the process of abortion decision-making but also the consequence of having made the decision.

What does the law mean to accomplish through the formal interrogation of pregnant minors in court? This Article argues that bypass hearings serve less to evaluate the quality of a young woman's decision than to punish her for making it. The hearings provide an opportunity to inflict a kind of legal harm—harm by process—on young women seeking to abort. They produce a civil version of what Malcolm Feeley identified in the criminal context as “process as punishment.”<sup>34</sup> This is the proposition that participation in criminal proceedings, long before trial or conviction, can itself be punitive.<sup>35</sup> My primary focus is on a form of harm that is pervasive but not always immediately apparent. This is the humiliation of minors through the mechanism of what I call “compelled narrative”—the requirement that minors testify in court about their sexual relationships, their pregnancy, and the intricacies of home life that led them to decide not to involve parents but to turn to law for relief instead.

Bypass hearings should concern us specifically, as lawyers and as citizens, because of how legal process is used to patrol teenage abortion and to harass girls who petition for relief. How does this come about? Hearings are supposed to be a source of dignity, not disrespect, a site of justice, not harm. Yet there is something intuitively unseemly, perhaps even suspicious, about the practice of sending girls to court in these circumstances. As Feeley observed with regard to the treatment of low-level criminal defendants in pretrial hearings, “[w]hatever majesty there is in the law may depend heavily on these encounters”; they are where many people “form impressions of the American system of criminal justice.”<sup>36</sup> Of course, bypass hearings are not criminal; the petitioning minor appears unopposed in a civil action. Yet the hearings often *seem* as if they were criminal, particularly to minors—once the “favorites of the law” on account of their

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<sup>34</sup> See generally MALCOLM FEELEY, *THE PROCESS IS THE PUNISHMENT* 5 (1992).

<sup>35</sup> *Id.* at 199–201.

<sup>36</sup> *Id.* at 5.

vulnerability—who have no choice but to encounter law as it is handed to them in trial courts around the country.

With this framework in mind—and keeping an eye on the majesty of law—Part II begins with an overview of the bypass system: its constitutional origins and key procedural features. These include the mechanics of filing, the centrality of confidentiality and speed, the standards used to determine a minor’s maturity and best interests, and the ever-important burden of proof. It is important to have a sense of these basic rules in order to understand how they are implemented by real judges and how they are experienced by real girls.

The Article then turns to the matter of harm. One way to assess harm might be to look at the outcome of bypass hearings; are most pregnant minors turned down and left to fend for themselves? The answer is no. Despite the perplexing quality of a great many decisions in which petitions are turned down, almost all petitions that are filed are approved. But that seemingly positive news about outcomes distracts attention from the injurious content of the hearings themselves. For it is less a hearing’s outcome—whether a girl’s petition is granted or denied—than the consequences for her by virtue of her participation in the process that is the problem.

Part III explores two specific categories of harm. The first concerns the immediate risks of medical delay and public exposure. The second takes up the more subtle matter of humiliation and considers just what constitutes humiliation for a pregnant teenage girl. Humiliation is often contextually contingent in ways that are not universally apparent. As Justice Ruth Ginsburg recently observed with regard to the strip search of a middle schooler, “[i]t’s a very sensitive age for a girl. I didn’t think my [male] colleagues, some of them, quite understood.”<sup>37</sup> Attending to the spirit of Justice Ginsburg’s observation, this Part looks at the kinds of testimony pregnant girls are asked to produce and at the problematic relation between testimony, humiliation, and dignity in this fraught context. It also considers the stab to dignity when courts refuse, as some do, to hear a girl’s case at all.

Part IV zooms in on a particularly troubling aspect of bypass testimony. Depending on the judge—and as we shall see, a great deal depends on the judge—bypass petitioners are sometimes urged to do more than prove their maturity. In some courts they are also expected to display

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<sup>37</sup> Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY, May 5, 2009, available at [http://www.usatoday.com/news/washington/judicial/2009-05-05-ruth-ginsburg\\_N.htm](http://www.usatoday.com/news/washington/judicial/2009-05-05-ruth-ginsburg_N.htm).

some form of remorse or moral accountability. Because remorse suggests culpability, it is important to understand the nature of the minor's wrongdoing, as well as how she is supposed to overcome it in this context. To do this, I consider bypass hearings alongside other hearings involving supplicants before the law. These include parole hearings, allocutions before sentencing, and the interesting historical example of pardon tales from sixteenth century France. Each illuminates the situation of those compelled to tell a story in court in order to obtain the benefit of law. That task is especially hard in the bypass setting where, as we shall see, the very structure of the hearing conveys an element of stealth, and where the petitioners' age and sex limit their performative scope.

Part V returns to the question of purpose, and I focus on two aspects of this: the significant expressive function, social and political, of parental involvement legislation and the bypass process as punishment. The two fit together, as girls are made to pay a price both for deciding on abortion and for everything else they did that led to their present predicament.

But it is not only pregnant minors who are harmed by judicial bypass hearings, though they bear the brunt of it. The process also and deeply discredits the legal system itself. The remainder of the Article examines several ways in which this comes about. The first considers the problem of sham hearings, and turns for illumination to a well known example from the past: divorce hearings in the days before no-fault, when married couples complied with the law's demands for fault by telling stories in court. This Part also considers the unhappy parallels between the current bypass process and the hearings held by the House Un-American Activities Committee ("HUAC") in the late 1950s, whose purpose was less to establish facts than to shame witnesses compelled to testify.

Of course not every bypass judge is out to harass or shame pregnant girls. Many conscientiously attempt to apply the maturity standard to the minors who appear before them. But in a number of counties and courtrooms, judges are hostile to bypass cases and sometimes to the petitioners themselves. Some judges have included moral verdicts within their assessment of a minor's maturity and others refuse to grant or even to hear bypass cases at all. The result is an arbitrariness of access and outcome that further discredits the legal system. As discussed in Part VI, forum exclusion is particularly obnoxious to law's legitimacy, producing a disillusionment with law by and on behalf of pregnant young women who are, after all, *entitled* to be heard.

I recognize that hearings for teenagers have always been complicated by the nature of juvenile proceedings themselves, which are

generally less formal than proceedings for adults and often flavored by the sometimes paternalistic, sometimes disciplinary instincts of judges. This has been especially true for girls, who were often brought to court for correction for behavior relating to sexual unruliness.<sup>38</sup> Bypass petitioners bring themselves to court, but they too are often treated as though wayward. To some extent this may be explained by institutional or generational familiarity with the earlier ungovernability model as well as various ongoing anxieties associated with girls in trouble. But this is not the entire explanation in the bypass context. To understand how these hearings work, it is necessary to look as well at the politics of abortion. How those politics have made their way into the bypass process becomes clear in nearly every section of this Article. How anti-abortion politics has made its way into the election of judges is the special subject of Part VII.

## II. JUDICIAL BYPASS HEARINGS

### A. Origins

Thirty-four states now require that before a pregnant minor can have an abortion, she must first either notify or get consent from her parents (one or both, depending on the state)<sup>39</sup> or successfully petition a judge at the confidential hearing known as a judicial bypass hearing. The arrangement results from a constitutional compromise concocted by the Supreme Court in the 1979 case of *Bellotti v. Baird*.<sup>40</sup> In *Roe v. Wade*, the Court had held that a constitutionally protected right of privacy was “broad enough to encompass a woman’s decision whether or not to terminate her

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<sup>38</sup> Cheryl Hicks, “*In Danger of Becoming Morally Depraved*”: *Single Black Women, Working-Class Black Families, and New York State’s Wayward Minor Laws, 1917–1928*, 151 U. PA. L. REV. 2077, 2103 (2003) (citing MARY ODEM, *DELINQUENT DAUGHTERS: PROTECTING AND POLICING ADOLESCENT FEMALE SEXUALITY IN THE UNITED STATES, 1885–1920* 159 (1995) (“[P]arents hoped that the court would help strengthen their flagging authority over the social and sexual activities of their teenage daughters.”)).

<sup>39</sup> Twenty-two states require parental consent, eleven require parental notification, and four require both. See GUTTMACHER INST., *STATE POLICIES IN BRIEF: AN OVERVIEW OF STATE ABORTION LAWS*, OCT. 1, 2009, available at [http://www.guttmacher.org/statecenter/spibs/spib\\_OAL.pdf](http://www.guttmacher.org/statecenter/spibs/spib_OAL.pdf). The burden of notification is on the physician performing the abortion, rather than the minor. And, in most states, the parents must sign a statement of notification or consent which the minor then brings to her doctor.

<sup>40</sup> *Bellotti v. Baird*, 443 U.S. 622 (1979).

pregnancy.”<sup>41</sup> But did the language of *Roe* regarding women’s decisions include “little women” as well?

The answer emerged from a predictable collision between abortion jurisprudence and parental rights. The Supreme Court has long upheld the authority of parents to make decisions on behalf of their children, even in areas of life about which a teenage child might well have an opinion.<sup>42</sup> As the Court explained in *Bellotti*, this decisional superiority derives from the sum of several propositions: that children (in general) do not make sound decisions; that parents (in general) will decide wisely on their behalf; and that whether wise or not, parents have a constitutionally protected liberty interest in raising their children as they see fit.<sup>43</sup> At the same time, as the Court had recognized in a 1967 juvenile delinquency proceeding, the Constitution also applies to minors: “[W]hatever may be their precise impact, neither the Fourteenth Amendment or the Bill of Rights is for adults alone.”<sup>44</sup>

The tension between conceptions of pregnant girls as juvenile rights bearers and pregnant girls as daughters was squarely joined in the context of abortion, and in *Bellotti* the Supreme Court worked out the “precise impact” of *Roe* for girls. Acknowledging that “there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible,”<sup>45</sup> the Court held that as with pregnant women, no one—not parent, not boyfriend, not whoever the father might be—may have an absolute veto over a pregnant girl’s decision to abort. At the same time, in consideration of children’s “peculiar vulnerability,” their “inability to make critical decisions,” and the importance of the parental

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<sup>41</sup> *Roe v. Wade*, 410 U.S.113, 152 (1973).

<sup>42</sup> The starting point is *Meyer v. Nebraska*, 262 U.S. 390 (1923) (discussing the liberty of parents and guardians to direct upbringing and education of children under their control. See generally Barbara Woodhouse, *Who Owns this Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

<sup>43</sup> *Bellotti v. Baird*, 443 U.S. 622, 647 (1979).

<sup>44</sup> *In re Gault*, 387 U.S. 1, 13 (1967) (extending to minors the rights to counsel, to be informed of charges, and to a record in a juvenile proceeding). Minors have since acquired other, qualified rights in such areas as criminal procedure, free speech, and in certain aspects of procreative liberty, such as obtaining contraception. See *Carey v. Population Servs.*, 431 U.S. 678 (1977) (overturning New York’s ban on provision of contraceptives to minors under sixteen). New York had argued that the ban furthered “the State’s policy against promiscuous sexual intercourse among the young.” *Id.* at 692.

<sup>45</sup> *Bellotti*, 443 U.S. at 642.

role in child rearing, states could condition a girl's decision to abort on the consent of her parents.<sup>46</sup>

In harmonizing these seemingly antithetical interests—the minor's right to choose and the parent's right to control—the Court recognized that pregnant teens, “especially those living at home,” are vulnerable to parental efforts to obstruct their access to abortion.<sup>47</sup> To avoid this *de facto* veto, the Court concluded that minors must be given the opportunity to go directly to court instead of involving their parents.<sup>48</sup> In effect, the decision extends *Roe* to minors provisionally.

Each year thousands of pregnant teenagers learn, whether by going online, visiting a clinic, or through teenage word-of-mouth, that if they want an abortion they must first have either a note from home or an order from court. As we shall see, it is the cost to minors of getting the court order that produces the misuse of law. Of course, not all states require parental involvement. Several, such as New York, have no such legislation. In others, such as California, Montana, and New Jersey, parental involvement statutes have been found to burden a minor's right to privacy under state constitutions.<sup>49</sup> But in the states that prefer parental involvement, the price extracted is all the more unjustifiable because bypass hearings are not required. In a much forgotten footnote in *Bellotti v. Baird*, the Court observed that there is nothing sacrosanct about a judicial hearing as the alternative to parental involvement, stating: “We do not suggest, however, that a State choosing to require parental consent could not delegate the

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<sup>46</sup> *Id.* at 623, 634.

<sup>47</sup> *Id.* at 647 (“It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.”).

<sup>48</sup> *Id.* at 643–44. The Massachusetts statute challenged in *Bellotti* required parental consent. While a number of states have consent requirements, others require only that parents be notified of their daughter's intent to abort, a seemingly milder form of parental participation. Although the Supreme Court has never decided whether a bypass procedure is required for notification-only statutes, every notification state but Utah has included a judicial bypass provision and the Supreme Court has affirmed that this satisfies any constitutional demands. *Hodgson v. Minnesota*, 497 U.S. 417, 454 (1990). The Fourth Circuit has opined, however, that because notice is a less burdensome requirement than consent, no bypass procedure would be required for its validity. *Planned Parenthood of Blue Ridge v. Camblos*, 116 F.3d 707, 715–16 (4th Cir. 1997).

<sup>49</sup> *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997); *Lambert v. Wicklund*, 520 U.S. 292 (1997); *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000), *But see Pro-Choice Miss. v. Fordice*, 716 So.2d 645 (Miss. 1998) (upholding Mississippi's two-parent consent law as constitutional under the State constitution).



alternative procedure to a juvenile court or an administrative agency or officer.”<sup>50</sup> It will be useful to keep the court’s proviso in mind as the nature of the hearings unfold.

## B. Operation

### 1. The Petition

The bypass petition, or “application” in some states, generally requires the minor to state her age, the fact of her pregnancy (and sometimes an estimate of how pregnant she is), and, borrowing language from Arizona’s form, an affirmation that she wants to “terminate her pregnancy by abortion.”<sup>51</sup> In all but two states, parental involvement laws apply to all minors under the age of 18: Delaware sensibly exempts minors over the age of sixteen,<sup>52</sup> and West Virginia defines a minor for bypass purposes as “any person under eighteen years who has not graduated from high school.”<sup>53</sup>

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<sup>50</sup> *Bellotti*, 443 U.S. at 643 n.22.

<sup>51</sup> Ariz. Supreme Court, Abortion, Request by Minor Without Consent of Parent, [http://www.supreme.state.az.us/selfserv/abortion\\_forms.htm](http://www.supreme.state.az.us/selfserv/abortion_forms.htm) (last visited Oct. 1, 2009) (follow “Petition to Authorize Physician to Perform Abortion”). Some states require the minor to specify the statutory grounds on which her petition is based. For example, in Arizona she can check off the statement, “I am mature and capable of giving informed consent to the proposed abortion,” or the statement, “It is in my best interests to have an abortion without the consent of my parent(s), guardian, or conservator.” *Id.*; ARIZ. REV. STAT. ANN. § 36-2152 (2009). In Texas, the minor must check one of three reasons why she does not want to notify her parents: that she is “mature enough . . . and know[s] enough about abortion to make this decision,” that telling her parent(s) is not in her best interests, or that telling her parent(s) “may lead to [her] physical, sexual or emotional abuse.” Tex. Sup. Ct., Promulgation of Forms for Use in Parental Notification Proceedings Under Chapter 33 of the Family Code, *available at* <http://www.supreme.courts.state.tx.us/MiscDocket/99/99924300.pdf>; TEX. FAM. CODE ANN. § 33.003 (Vernon 2009).

<sup>52</sup> Parental Notice of Abortion Act, DEL. CODE ANN. tit. 24, § 1782 (6) (2009) (defining a minor as “a female person under the age of 16”). Exempting teenagers 16 and over makes good sense as at least a partial reform of bypass laws. With regard to many areas of (more or less) adult life, such as working, leaving school, and engaging in consensual sex, sixteen year olds are treated as adults. It would be useful to know as an empirical matter whether judges, even *sub silentio*, take judicial notice of the fact that sixteen- and seventeen-year-olds are mature enough to make an abortion decision; in many courts the answer is probably “Yes.”

<sup>53</sup> W. VA. CODE § 16-2F-2 (2009).

The petition forms differ from state to state and, in order to help minors fill them out properly, a number of states provide instructions (in Texas in both English and Spanish).<sup>54</sup> The instructions typically respond to the specific concerns of teenagers regarding such matters as costs (none), confidentiality (promised), and the availability of legal assistance (appointed).<sup>55</sup> Private agencies, such as the Women's Law Project in Pennsylvania,<sup>56</sup> Jane's Due Process in Texas,<sup>57</sup> and various Planned Parenthood affiliates,<sup>58</sup> also provide information on the legal requirements for abortion. Staff at medical clinics, where many minors first learn that their own consent is not enough, also provide such information.<sup>59</sup> This summary of assistance may paint too bright a picture of how the bypass

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<sup>54</sup> See Tex. Sup. Ct., Instructions for Applying to the Court for a Waiver of Parental Notification: Parental Notification Rules and Forms, forms 2A, 2B (2007) (promulgated pursuant to Tex. Fam. Code §§ 33.003[1], 33.004[c]), available at <http://www.supreme.courts.state.tx.us/rules/pnr/pnForms052308.pdf> (English version), <http://www.supreme.courts.state.tx.us/rules/pnr/spanish33.pdf> (Spanish version). The North Carolina instructions explain legal vocabulary: "You ask the Court for a waiver by filing a 'petition.' . . . The 'petition' is a form that is available in the office of the Clerk of Superior Court in every county courthouse." Administrative Office of the Courts, Petition For Waiver Of Parental Consent, AOC-J-601 INS (2004), available at <http://forms.lp.findlaw.com/form/courtforms/state/nc/nc000452.pdf>. North Carolina requires that "the minor . . . [be] given assistance in preparing and filing the petition." Parental or Judicial Consent for Abortion, N.C. GEN. STAT. § 90-21.8 (2009). While this type of assistance is helpful, experienced professional guidance is often crucial, as court personnel are not always knowledgeable in how to go about the process.

<sup>55</sup> The Texas materials pose and answer three primary questions: what are my choices, besides abortion; what are the dangers of having an abortion; and what is it important for me to know about the Abortion Parental Notification Law. Tex. Sup. Ct., *supra* note 54. The materials may also explain what happens after a petition is filed: "The clerk will set a time for you to meet with a judge. This meeting is called a 'hearing.'" *Id.* North Carolina, Bypass Form, <http://forms.lp.findlaw.com/form/courtforms/state/nc/nc000452.pdf> (last visited Oct. 1, 2009).

<sup>56</sup> WOMEN'S LAW PROJECT, YOUNG WOMEN'S GUIDE TO ABORTION IN PENNSYLVANIA (2009), available at [http://www.womenslawproject.org/brochures/wlp\\_teen\\_piece.pdf](http://www.womenslawproject.org/brochures/wlp_teen_piece.pdf).

<sup>57</sup> Jane's Due Process, About Judicial Bypass, <http://www.janesdueprocess.org/teens/legalrights/judicialbypass> (last visited Oct. 1, 2009).

<sup>58</sup> Planned Parenthood, Judicial Bypass FAQ, <http://www.plannedparenthood.org/rocky-mountains/judicial-bypass-faq-10564.htm> (last visited Oct. 1, 2009).

<sup>59</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, THE JUDICIAL BYPASS: REPORT ON A MEETING 8 (2008) (on file with author).

process works in fact. While in some jurisdictions courts and agencies help minors in the initial stages of the process, in others the advice handed out from court personnel, from clerks to judges, has been inept, inconsistent, morally tinged, or nonexistent.<sup>60</sup>

After a petition has been filed, unrepresented minors are put in touch with a court-appointed or volunteer lawyer. Here, too, follow-through is often lacking or mismanaged, even in states like Tennessee that specifically provide for the appointment of trained advocates.<sup>61</sup>

## 2. Procedural Features

In deciding that bypass hearings accommodated the application of *Roe* to minors, the Supreme Court provided a blueprint of sorts, which emphasized the constitutional significance of two aspects of the process: anonymity and speed.<sup>62</sup> Without the assurance of anonymity, the minor might be found out by her parents and prevented from petitioning a court or seeing a doctor: the *de facto* veto.<sup>63</sup> Without the assurance of speed, she might be timed out of the safest methods of early abortion or perhaps lose the right altogether.<sup>64</sup> It may be helpful to think of minors as possessing twinned rights: the right to decide whether or not to have an abortion and

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<sup>60</sup> See HELENA SILVERSTEIN, *GIRLS ON THE STAND: HOW COURTS FAIL PREGNANT MINORS* 52 (2008) (reporting that “[f]orty percent of Alabama courts, just over 45 percent of Tennessee courts, and a whopping 73 percent of Pennsylvania courts proved inadequately acquainted with their responsibilities”).

<sup>61</sup> Helena Silverstein et al., *Judicial Waivers of Parental Consent for Abortion: Tennessee’s Troubles Putting Policy into Practice*, 27 *LAW & POL’Y* 399, 412–17 (2005).

<sup>62</sup> *Bellotti v. Baird*, 443 U.S. 622, 644 (1979) (“[Bypass hearings] must assure that a resolution of the issue, and any appeals that may follow, will be completed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained.”). Some states have stuck to the bare bones of the structure sketched in *Bellotti*, while others, like Texas, have produced significantly more detailed rules and guidelines. See, e.g., Ann Crawford McClure et al., *A Guide to Proceedings Under the Texas Parental Notification Statute and Rules*, 41 *S. TEX. L. REV.* 755 (2000). Written by experts on Texas procedure, the article was intended as a technical guide for lawyers and judges implementing the state’s bypass legislation. *Id.* at 759.

<sup>63</sup> *Bellotti*, 443 U.S. at 644 (“In sum, the procedure must ensure that the provision requiring parental consent does not in fact amount to [an] ‘absolute, and possibly arbitrary, veto.’”).

<sup>64</sup> *Id.* at 651 n.31 (noting that abortions are most accessible during the first trimester).

the right to seek a judicial bypass of parental involvement. The second effectuates the first.

*i. Anonymity*

The demands of anonymity are met in a number of ways. In all states, petitions are captioned by initials or under Jane Doe or Anonymous aliases.<sup>65</sup> The hearings are closed to the public,<sup>66</sup> although petitioners may bring a relative or friend for support.

Minors are informed that the petition is confidential. North Carolina, among other states, alerts minors to an important exception: as mandated reporters, judges must report instances of rape or incest to the Department of Social Services.<sup>67</sup>

Individual states have put other practical safeguards in place. Most provide that a minor can designate by what means she (or someone else on her behalf) should be contacted regarding the hearing date, ruling, or any other official communication such as an appeal.<sup>68</sup> Cell phones, beepers, and

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<sup>65</sup> See MICH. COMP. LAWS ANN. § 722.904(2) (a) (2009) (requiring that the probate court “upon its first contact with a minor seeking a waiver . . . provide [her] with notice of [her] right to . . . [c]onfidentiality of the proceedings, including the right to use initials in the petition”). States use different methods to keep track of the true identity of petitioners. Arizona, for example, permits the petition to be signed by a true name, initials, or fictitious name; the petition is accompanied by a “Data Sheet” which states the minor’s true name if she has used an alias. 2009 ARIZ. LEGIS. SERV., ch. 172 (H.B. 2564) (West), *to be codified at* ARIZ. REV. STAT. § 36-2152[B],[E], petition and data sheet *available at* <http://www.supreme.state.az.us/selfserv/Abortion%20Forms/DataSheet.pdf>. Texas uses a similar system: a cover page with a Jane Doe designation and a “verification page” with the minor’s actual name. *See, e.g.*, Tex. Sup. Ct., Parental Notification Rules and Forms, Rule 2, Proceedings in the Trial Court (2007), *available at* [http://www.supreme.courts.state.tx.us/rules/pdf/SCAC\\_Chapter\\_33\\_Rules\\_Forms.pdf](http://www.supreme.courts.state.tx.us/rules/pdf/SCAC_Chapter_33_Rules_Forms.pdf).

<sup>66</sup> *See, e.g.*, Tex. Sup. Ct., *supra* note 54, at Form 1A (“[t]he only persons allowed to be [at your hearing] are you, your guardian *ad litem*, your lawyer, court staff, and any person whom you request to be there. . . . No one [except the court] can inspect the evidence.”); MICH. COMP. LAWS ANN. § 722.904(2) (g) (2009). It is not uncommon for a minor to bring a parent. *See, e.g.*, *In re Anonymous*, 678 So.2d 783 (Ala. Civ. App. 1996) (petitioner’s mother accompanied her daughter to the hearing, even though the mother’s religious beliefs prevented her from consenting to the abortion). In that case the mother also testified that she would take her daughter for the abortion and care for her during her recovery. The trial court denied the petition. *Id.* at 784.

<sup>67</sup> N.C. GEN. STAT. § 90-21.8 (f) (2009)

<sup>68</sup> The Texas instructions explain that “you may list a phone, pager, beeper, or fax number, or other way that you can be contacted,” emphasizing that “[i]t is very important that you provide this information because the court may later need to contact you about your

paggers have helped greatly in this regard. Minors have also been alerted to be mindful of their computer history.<sup>69</sup> In Texas, if a bypass petition is filed by fax, court personnel are required to “take all reasonable steps” to maintain its confidentiality so that the form does not sit out on the office fax machine.<sup>70</sup> Heightened concern regarding the confidentiality of the forms is well justified, as in some states, the petitions or accompanying documentation may contain facts about the minor’s history (or fear) of abuse or incest, the date of conception, and the date and location of her intended abortion.<sup>71</sup> Publicity around any of these might put a minor or her plans at risk.

*ii. Speed*

Time is a critical factor in the bypass context. As the Ninth Circuit explained, “if the abortion decision is hindered or burdened during the earlier stages of pregnancy, the performance of an abortion may be delayed until such time as the state can more extensively regulate the exercise of a woman’s constitutional right.”<sup>72</sup> The requirements of timeliness are met in a number of ways. Bypass petitions typically receive docketing priority on court calendars. In addition, most states have prescribed maximum periods during which a ruling on the petition must be handed down.<sup>73</sup> In

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application. If you cannot be contacted, your application will be denied.” Tex. Sup. Ct., *supra* note 54.

<sup>69</sup> Jane’s Due Process advises minors trying to learn about pregnancy options: “If someone might check to see what you’ve been doing online, it’s safest to use a computer at a friend’s house, library, or other place that you trust to keep your information private.” Jane’s Due Process, Homepage, <http://www.janesdueprocess.org/> (last visited Oct. 1, 2009).

<sup>70</sup> McClure et al., *supra* note 62, at 800 (describing Rule 1.5(a)).

<sup>71</sup> See, e.g., IOWA CODE ANN. § 232.152 (2008); IOWA CT. RULES 8.34, JUVENILE PROCEDURE FORM 1, available at <http://www.iowacourts.gov/wfdata/frame2943-1593/File5.pdf>.

<sup>72</sup> Glick v. McKay, 937 F.2d 434, 441 (9th Cir. 1991) (holding that, because Nevada’s parental notification law did not specify a fixed time period, it failed to meet the expediency requirement established in *Akron II* and *Bellotti*), *overruled on other grounds by* Lambert v. Wicklund, 520 U.S. 292 (1997).

<sup>73</sup> See Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1109–10 (5th Cir. 1997) (Louisiana’s failure to set an outside time limit for the juvenile court’s ruling or to provide constructive authorization in the absence of a ruling failed to provide the expeditious proceedings required by *Bellotti*); Ind. Planned Parenthood Affiliates Ass’n. v. Pearson, 716 F.2d 1127, 1135–37 (7th Cir. 1983) (holding that because an Indiana statute failed to mention the appellate process at all, expeditious consideration of appeals was not “assured”).

Mississippi, it is no more than seventy-two hours after the petition is filed;<sup>74</sup> in North Carolina, no more than seven days.<sup>75</sup> A judge's failure to rule within the specified time (the "pocket veto") results in a default judgment granting the petition.<sup>76</sup> Such default or "deemed granted" provisions can be tremendously important in counties where judges are reluctant to be associated with successful bypass petitions.<sup>77</sup>

Despite these schedules, in states that grant maximum periods for trial court and appellate decisions, it can take up to three full weeks from filing the petition to the court's final ruling.<sup>78</sup> This is a significant period in the context of pregnancy. Requiring any woman seeking an abortion to remain pregnant for three additional weeks after her decision has been made may well have both medical and psychological implications for her.<sup>79</sup>

### 3. Maturity and Best Interest Standards

Bypass judges are charged with resolving two basic questions.<sup>80</sup> The first is whether the petitioning minor has proven that she is mature and informed enough to make an abortion decision. If the judge finds that she has, he must grant her petition. If the judge finds that she has not, then he must resolve a second question: even if the minor's decisional competence is lacking, is an abortion nonetheless in her best interest? If the answer to

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<sup>74</sup> MISS. CODE ANN. § 41-41-55(3) (2009).

<sup>75</sup> N.C. GEN. STAT. § 90-21.8(d) (2009).

<sup>76</sup> See, e.g., N.C. GEN. STAT. § 90-21.8(d) (2009); MISS. CODE ANN. § 41-41-55 (3) (2009).

<sup>77</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 59, at 15 (discussing the electoral and moral difficulties faced by many judges and describing how a judge could publicly "refuse to sign an order . . . knowing that, in a short period of time, it would be granted").

<sup>78</sup> *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990) (Blackmun, J., dissenting) ("Ohio's judicial-bypass procedure can consume up to three weeks of a young woman's pregnancy."); see also OHIO REV. CODE ANN. §§ 2151.85(B) (1) (2009) (requiring the trial court to make its decision within five business days after the minor files her complaint); OHIO REV. CODE ANN. §§ 2505.073(A) (2009) (requiring the court of appeals to docket an appeal within four days after the minor files a notice of appeal); OHIO RULE APP. PROC. 14(A) (requiring the court of appeals to render a decision within five days after docketing the appeal).

<sup>79</sup> I thank Imogen Goold for this insight.

<sup>80</sup> *Bellotti v. Baird*, 443 U.S. 622, 647-48 (1979).

this question is yes, the judge must grant the petition. If the judge thinks an abortion is not in her best interests, the minor's petition is denied. At this point, putting aside an appeal, the petitioner who has been deemed too immature to decide to have an abortion is left by law to have a baby.

What standards do courts use to determine whether a minor is mature? As the Supreme Court noted in *Bellotti*, maturity is "difficult to define, let alone determine. . . . The peculiar nature of the abortion decision requires . . . a case-by-case evaluation."<sup>81</sup> Some states have provided trial judges with statutory guidance. Pennsylvania provides that "the court shall hear evidence relating to the maturity, intellect and understanding of the pregnant woman, the fact and duration of her pregnancy, the nature, possible consequences and alternatives to abortion, and any other evidence the court may find useful."<sup>82</sup> Texas also focuses on the process by which a decision is reached: its Supreme Court held that "the evidence [must] demonstrate[] that the minor is capable of reasoned decision-making and that her decision is not the product of impulse, but is based upon the careful consideration of the various options open to her and the benefits, risks, and consequences of those options."<sup>83</sup> As to whether a minor is "sufficiently well informed," the Texas criteria are typical: the minor must show that she has learned about medical risks from a health care professional, understands those risks, knows there are alternatives to abortion, and is aware of its emotional and psychological implications.<sup>84</sup>

Despite the articulation of general standards, there is significant discretion in their application. In explaining the vast discrepancies in bypass

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<sup>81</sup> *Id.* at 644.

<sup>82</sup> 18 PA. CONS. STAT. § 3206(f) (2009). *See also* Satsie Veith, *The Judicial Bypass Procedure and Adolescents' Abortion Rights: The Fallacy of the 'Maturity' Standard*, 23 HOFSTRA L. REV. 453 (1994).

<sup>83</sup> *In re Doe*, 19 S.W.3d 249, 255 (Tex. 2000). As to whether a minor is "sufficiently well informed," Texas requires a showing that the minor has obtained information about health risks from a health care professional and understands them, that she understands the alternatives to abortion, and that she is aware of the emotional and psychological implications of abortion. *Id.* *See also In re Anonymous* 964 So.2d 1239 (Ala. Civ. App. 2007) (affirming denial of petition of minor whose testimony "did not indicate that she had discussed with a doctor, a nurse, or a counselor any potential psychological or emotional problems that might arise after having an abortion"). *But see In re Doe*, 19 S.W. 3d 249, 259 (Tex. 2000) (information about the psychological consequences of abortion need not be received from licensed professional counselors so long as it is from "reliable and informed sources").

<sup>84</sup> *Id.* at 256.

outcomes by county, one Ohio judge noted simply: “My view of maturity is not someone else’s view of maturity.” Ohio bypass attorney Alphonse Gerhardstein put it slightly differently: “We’re starved for standards because everyone thinks they have the answer.”<sup>85</sup>

If a minor is found to be insufficiently mature or informed, how do courts determine her best interests? In some states, the question is whether an abortion—full stop—is in the immature minor’s best interest. Other states put the question differently and ask whether an abortion *without notification to a parent* is in the best interests of the minor. Thus, in a Nebraska case, a thirteen-year-old who “lives with her parents, has never lived on her own, and has never handled her personal finances or held employment other than a summer job detasseling corn” failed to prove by clear and convincing evidence that she was sufficiently mature, or that an abortion without notifying her parents would be in her best interest.<sup>86</sup> But under either formulation, the answer in almost every published case has been no.

As with maturity, the standards for best interests are also quite roomy. The Florida Supreme Court has listed among the factors to be considered:

the minor’s emotional or physical needs; the possibility of intimidation, other emotional injury, or physical danger to the minor; the stability of the minor’s home and the possibility that notification would cause serious and lasting harm to the family structure; the relationship between the parents and the minor and the effect of notification on that relationship; and the possibility that notification may lead the parents to withdraw emotional and financial support from the minor.<sup>87</sup>

Some states have urged common sense in the application of standards. A Kansas court cautioned that “the examining court must weigh

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<sup>85</sup> See Catherine Candisky & Randall Edwards, *Abortion Waivers are a Judicial Crapshoot*, THE COLUMBUS DISPATCH, Feb. 29, 1993, at 1A [hereinafter Candisky & Edwards, *Abortion Waivers*]; Steven F. Stuhlberg, *When is a Pregnant Minor Mature? When is an Abortion in her Best Interests? The Ohio Supreme Court Applies Ohio’s Abortion Parental Notification Law*, 60 U. CIN. L. REV. 907 (1992); see also Suellyn Scarnecchia & Julie Kunce Fields, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75, 98–101 (1995) (proposing a set of standardized questions for judges in Michigan).

<sup>86</sup> *In re Anonymous I*, 558 N.W.2d 784, 788 (Neb. 1997) (per curiam).

<sup>87</sup> *In re Doe*, 973 So.2d 548, 553 (Fla. Ct. App. 2008).



[the minor's] situation not against the ideal but against a standard of basic understanding of her situation, her choices, and her options."<sup>88</sup>

#### 4. Burden of Proof and Standard of Review

A critical issue for trial court judges is whether the petitioning minor, as the moving party, has met the burden of proof regarding her maturity or best interests.<sup>89</sup> (Keep in mind that the minor is also the *only* party.)<sup>90</sup> Most states have adopted the "preponderance of the evidence" test typically used in civil actions.<sup>91</sup> Yet other states, like Nebraska and Arizona, apply the higher "clear and convincing" standard.<sup>92</sup> There seems to be a sense in these states that girls "have it easy" going into a bypass hearing, which an Arizona court characterized as "a proceeding that encroaches on a parent's ability to exercise [traditional authority]" over a child.<sup>93</sup> In the case of *In re B.S.*, the Arizona Court of Appeals explained that because minors are both unopposed and represented by counsel, the higher standard "avoid[s] making judicial bypass a mere pass-through proceeding."<sup>94</sup> In addition, the Arizona court explained that the "magnitude of the presented issue" justified departing from the normal preponderance standard, because abortion involves "intensely personal interests," granting the petition (too

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<sup>88</sup> *In re Doe*, 866 P.2d 1069, 1074 (Kan. Ct. App. 1994).

<sup>89</sup> See *Ohio v. Akron Center for Reprod. Health*, 497 U.S. 502 (1990) (upholding an Ohio statute placing a clear and convincing burden of proof on the minor). Where state statutes have been silent on the burden of proof, courts have assigned it to minors, noting that *Akron* simply follows the general rule in civil cases that the party asserting the affirmative of an issue bears the burden of proving it. See *In re B.S.*, 74 P.3d 285, 289 (Ariz. Ct. App. 2003); see also *In re Anonymous 1*, 558 N.W.2d 784, 787 (Neb. 1997); *In re Anonymous*, 833 So. 2d 75, 78 (Ala. Civ. App. 2002); *In re Jane Doe IV*, 19 S.W.3d 337, 339 (Tex. 2000).

<sup>90</sup> The exception is Alabama, where one judge has appointed a guardian ad litem for the fetus. Helena Silverstein, *In the Matter of Anonymous, a Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 CORNELL J.L. & PUB. POL'Y 69, 77-80 (2001) [hereinafter Silverstein, *Anonymous*].

<sup>91</sup> See, e.g., TEX. FAM. CODE ANN. § 33.003 (i) (2009).

<sup>92</sup> *In re Anonymous 1*, 558 N.W.2d 784, 787 (Neb. 1997); *In re B.S.*, 74 P.3d 285, 289 (Ariz. 2003).

<sup>93</sup> *In re B.S.*, 74 P.3d at 290.

<sup>94</sup> *Id.* at 289 (citing *Akron Center*, 497 U.S. at 516 (allowing the clear and convincing standard "when, as here, the bypass procedure contemplates an *Ex parte* proceeding at which no one opposes the minor's testimony")).

easily) would have “irreversible consequences” for the minor.<sup>95</sup> Of course, *not* granting the petition also has irreversible consequences that are intensely personal, and about which the minor has already made a decision. Nonetheless, the court’s explanations reveal how judicial attitudes about abortion permeate even the procedural aspects of the bypass process.

As with the burden of proof, the sense that bypass petitioners have an abundance of procedural advantages has influenced courts in other matters as well. In 2001, the Supreme Court of Alabama reversed an earlier decision that undisputed bypass testimony must be accepted as true, noting that “where a minor seeks a waiver of parental consent for an abortion *and no adverse party cross-examines her* . . . a rule compelling acceptance of undisputed live testimony as true—without affording any deference to the trial court’s ability to . . . assess the demeanor of the witness—is unsound.”<sup>96</sup> There is no adverse party in a bypass hearing because of its distinctive constitutionally constituted nature, although, as we shall see, some judges do examine petitioners in a prosecutorial manner.

In most states the standard of review on appeal is abuse of discretion: a denial will be reversed only when the trial court’s decision is “plainly erroneous or manifestly unjust.”<sup>97</sup> Here too abortion politics flavor what this means. As a dissenting Alabama judge candidly stated, “[r]eligious opposition to abortion in this state is so pervasive and intransigent that we need a standard of review on appeal that will differentiate effectively between those judgments based on the evidence and the law and those based on nonjudicial factors.”<sup>98</sup>

### C. Outcomes and the Nature of Harm

Since bypass hearings were first introduced in the late 1970s, petitions have been denied for reasons that, on any fair reading of the facts, are simply hard to take. In 2001, an Alabama judge held that because sex education was taught in the public high school, the minor’s “action[s] in becoming pregnant . . . [are] indicative that she has not acted in a mature and well informed manner”;<sup>99</sup> another minor was declared immature

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<sup>95</sup> *Id.*

<sup>96</sup> *Ex parte* Anonymous, 803 So.2d 542, 546 (Ala. 2001) (emphasis added).

<sup>97</sup> *Id.* at 547.

<sup>98</sup> *Ex parte* Anonymous, 812 So.2d 1234, 1240 (2001) (Johnstone, J., dissenting).

<sup>99</sup> *In re* Anonymous, 684 So. 2d 1337, 1338 (Ala. Civ. App. 1996). An Ohio trial court similarly denied the petition of a minor who was days away from her eighteenth

because “she engaged in sexual intercourse ‘with her [college] scholarship on the line.’”<sup>100</sup> A Mississippi court denied the bypass petition of a college-bound seventeen-year-old, who testified that she would not be able to give up a baby for adoption because she had lost her own mother to cancer five years earlier, on the grounds that the girl was “simply afraid of the responsibility of motherhood.”<sup>101</sup> A Texas trial court turned down the petition of a seventeen year old who had researched abortion and its alternatives, had consulted with several counselors (including her home economics teacher and three formerly pregnant teenagers), and had chosen to look at the fetus on an ultrasound in order to confront her decision directly, on the grounds that “she did not understand the intrinsic benefits of keeping the child or of adoption.”<sup>102</sup> An Ohio court found that a minor who already had one child lacked maturity because she had failed to file a paternity action against that child’s father.<sup>103</sup> (There is at present no exemption for teens who are already mothers; they too must notify or get consent from their own parents.)<sup>104</sup> An Alabama court denied the petition of a seventeen-year-old cheerleader who supported herself with a full-time job and who had testified that she was “emotionally and mentally prepared [for an abortion], and if there were any complications she would go immediately to her doctor.”<sup>105</sup> As a frustrated appellate judge remarked in a similar case,

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birthday, taking college preparatory classes, and working to save for college on the grounds that her pregnancy alone indicated insufficient maturity. *In re Jane Doe*, 613 N.E.2d 1112, 1114–1115 (Ohio Ct. App. 1993).

<sup>100</sup> *In re Anonymous*, 905 So.2d 845, 848 (Ala. Civ. App. 2005) (upholding trial court decision). The court also based its ruling on the fact that “seeing the difficulties encountered by friends who have become pregnant, [the petitioner] got ‘herself into the same situation.’” *Id.*

<sup>101</sup> *In re A.W.*, 826 So.2d 1280, 1282 (Miss. 2002).

<sup>102</sup> *In re Jane Doe*, 19 S.W.3d 346, 358 (Tex. 2000).

<sup>103</sup> *Cleveland Surgi-Center Inc. v. Jones*, 2 F.3d 686, 689 (6th Cir. 1993), *cert denied*, 510 U.S. 1046 (1994).

<sup>104</sup> The exemption of pregnant teenage mothers from parental involvement laws is an area ripe for reform. If anyone knows what is at stake in a decision to have a child, it is surely mothers. See Rachel K. Jones et al., “*I Would Want to Give My Child, Like, Everything in the World*”: *How Issues of Motherhood Influence Women Who Have Abortions*, 29 J. FAM. ISSUES 79, 80 (2008). There is some irony in holding that a young mother is too immature to make an abortion decision about having another child; she is, after all, already legally responsible for all decisions regarding the children she already has. See Emily Buss, *The Parental Rights of Minors*, 48 BUFFALO L. REV. 785 (2000).

<sup>105</sup> *In re Anonymous*, 650 So. 2d. 923, 925 (Ala. Civ. App. 1994).

“[w]e can safely say, having considered the record, that, should this minor not meet the criteria for ‘maturity’ under the statute, it is difficult to imagine one who would.”<sup>106</sup> These cases remind one of the old southern literacy tests designed to keep black citizens from registering to vote. As a fifty-seven year old farmer, who tried unsuccessfully to register in 1954 and 1961 and then gave up, told an interviewer, he “had done his best and does not think that he could do any better.”<sup>107</sup>

In none of the bypass cases just discussed did the trial court decide that despite finding the minor was immature, an abortion was in her best interest. And while some of these cases were reversed on appeal, not all cases are reversed, or are even appealed. As Malcolm Feeley has pointed out in the criminal context, in terms of the significance for the individual, “for all practical purposes, the lower courts of first instance are also courts of last resort.”<sup>108</sup> The result in many bypass cases is that by the end of the formal hearing, girls deemed to lack the maturity to decide about abortion are thrown back on those same resources to proceed toward motherhood.

Of course, we do not know the *actual* end to bypass cases. Minors whose petitions are granted may change their minds, as certain Alabama judges regularly urge petitioners in that state.<sup>109</sup> Nor can we be certain what happens when a petition is denied—whether disappointed young women try again in another court or another state,<sup>110</sup> whether they travel to a non-bypass state, or whether they become mothers. We know very little about what happens to the girls in this last category: whether they continue to live at home, or raise their babies by themselves, or marry, or place their children up for adoption.

Ungrounded denials of bypass petitions of the sort described above—decisions in which judges declare well-informed young women immature for the purpose of defeating their decision to abort—excite our sense of injustice. The decisions appear to be stubborn misapplications of

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<sup>106</sup> *In re Anonymous*, 515 So.2d 1254, 1256 (Ala. Civ. App. 1987).

<sup>107</sup> Brian K. Landsberg, *Sumpter County, Alabama and the Origins of the Voting Rights Act*, 54 ALA. L. REV. 877, 904 (2003).

<sup>108</sup> FEELEY, *supra* note 34, at 33.

<sup>109</sup> Silverstein, *Anonymous*, *supra* note 90, at 99–100.

<sup>110</sup> The Sixth Circuit has upheld the filing of sequential petitions. In *Cincinnati Women’s Servs. Inc. v. Taft*, 468 F.3d 361 (6th Cir. 2006), the Court held that an Ohio parental consent statute limiting a minor to a single petition unduly burdened a minor whose circumstances changed such that she would be able to meet requirements of demonstrating increased maturity or increased medical knowledge. *Id.* at 369–71.

the standards by judges who may disapprove of abortion, disapprove of the young woman, or perhaps both. But although these unprincipled denials rile us up, they also serve to divert our attention from an aspect of the process that is as troubling and far more pervasive.<sup>111</sup> This is the set of harms inflicted on young women whose petitions are *approved* and who by that measure might be considered bypass success stories. Over the last twenty years, appellate courts have clarified the meaning of statutory standards so that fewer judges are able to disregard the record without being reversed on appeal. The result is that in most states, almost all girls willing to go to court can, in the long run, get judicial permission to have the abortions they seek.

But if nearly all bypass petitioners succeed, where is the harm? Proponents of California's 2008 parental involvement ballot measure insisted in their campaign materials that "out of millions of girls, the opposition [to Proposition 4] couldn't find ONE REAL GIRL harmed by a notification law."<sup>112</sup> Moreover, if bypass hearings are here to stay—as the Supreme Court has repeatedly and grumpily assured us is constitutionally the case<sup>113</sup>—perhaps the present state of affairs is not so bad from a practical perspective. Yes, there must be a hearing, but apparently most girls are able to negotiate their way through one, and sooner or later their

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<sup>111</sup> A five-year study of Minnesota bypass hearings revealed that out of 3,573 petitions, nine were denied, six were withdrawn, and 3,558 were granted. *Hodgson v. Minnesota*, 497 U.S. 417, 436 n.21 (1990). The Supreme Judicial Court of Massachusetts noted in 1997 that judicial approval is nearly a certainty. Out of 15,000 cases in Massachusetts heard by the year 2000, only 13 were denied and 11 of those were reversed on appeal. *See Planned Parenthood League of Mass. v. Att'y Gen.*, 677 N.E.2d 101, 105 (Mass. 1997). Planned Parenthood reports that during 2007, in six of its regional offices (the Rocky Mountains, Southeast Virginia, Bucks County and Central Pennsylvania, and Mid and South Michigan), out of 150 bypass petitions sought, none were denied. Richard Blum, *Planned Parenthood, Judicial Bypass*, Dec. 10, 2008 (presentation on file with author).

<sup>112</sup> League of Women Voters of California Education Fund, *Proposition 4*, <http://www.smartvoter.org/2008/11/04/ca/state/prop/4/> (last visited Oct. 1, 2009). Opponents of Prop 4 suggested that girls who faced telling abusive parents might attempt illegal abortions, or even suicide. *Id. See also Sarah's Law, Yes on 4*, <http://www.yeson4.net/> (last visited Oct. 1, 2009).

<sup>113</sup> As the Court noted in summarily rejecting a constitutional challenge to a parental involvement statute in *Casey*, "[w]e have been over most of this ground before." *Planned Parenthood Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992). In contrast, in a number of states, such as Montana, *Lambert v. Wicklund*, 520 U.S. 292 (1997), California, *Am. Academy of Pediatrics v. Lungren*, 940 P.2d 797 (Cal. 1997), and New Jersey, *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620 (N.J. 2000), parental involvement statutes have been found to burden a minor's right to privacy.

petitions are granted. The hurdle is high, but if most can clear it, what's the problem? What more is there to think about?

I suggest that there is a great deal more to think about, for it is the hearings themselves, and not just their outcomes, that are the misuse of law. Some of the harms faced by minors are concrete, such as the immediate problems of delay and public exposure. Other harms are less tangible, if no less important. These are the consequences to a vulnerable young person of compulsory participation in a high stakes hearing regarded by some as the price she has to pay.

### III. HARM TO MINORS

A great deal is put at stake by a minor's participation in the bypass process. In addition to whether or not the minor is to become a mother, this Section looks at the risks to her health, her well-being, and to her dignity.

#### A. The Risks of Delay

The medical consequences of delay are more serious in the case of teenagers, who already tend to acknowledge and confirm their pregnancies later than adults.<sup>114</sup> We understand the mix of causes: irregular periods, teenage denial and procrastination skills, and the childlike hope for a miracle. Nonetheless, the additional delay generated by the hearing (and possible appeal) means that some girls may have to undergo more elaborate abortion procedures and others risk being timed out of a legal abortion altogether.<sup>115</sup> After the Alabama Supreme Court remanded a case giving the trial judge twelve more days to "detail sufficiently the basis for appropriate findings" by conducting another hearing,<sup>116</sup> Justice Johnstone observed that "the mind-set of the trial court apparent from the record forebodes that a remand will not yield a different judgment but only a more legally sufficient

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<sup>114</sup> See generally Am. Acad. of Pediatricians, Committee on Adolescence, *The Adolescent's Right to Confidential Care When Considering Abortion*, 97 PEDIATRICS 746, 749 (1996).

<sup>115</sup> The nature of the abortion procedure has additional logistical implications. Clinics typically require an adult to pick up any patient if anesthesia is used; this necessarily complicates arranging transportation or accompaniment. NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 59, at 5. For an excellent account of how teenagers help one another by driving, waiting, being kind, see PATRICIA HERSCH, *A TRIBE APART: A JOURNEY INTO THE HEART OF AMERICAN ADOLESCENCE*, 194-205 (1999).

<sup>116</sup> *Ex parte* Anonymous, 889 So.2d 518, 520 (Ala. 2003).

rationale for denying relief. All the while the time for a safe abortion will be ticking by.”<sup>117</sup>

The importance of timing is not lost on minors. A Texas teenager who could have avoided a hearing by waiting just a few weeks until her eighteenth birthday instead petitioned the court to secure an abortion at the earliest stage of her pregnancy.<sup>118</sup> In reversing the trial court’s denial of her petition before publishing its full opinion, the Texas Supreme Court explained that “Doe was entitled to a bypass and out of concern that any further delay might expose her further [medical] risk . . . [w]e made our decision [to issue the order immediately] on the side of the minor’s safety.”<sup>119</sup>

Worries over the cost of an abortion may also deter a minor from acting. A Pennsylvania minor in foster care delayed petitioning because of “confusion among staff” in the Department of Human Services (her custodian) as to whether it would pay for an abortion.<sup>120</sup> Once advised the Department would pay, the minor immediately filed, but her petition was denied on the grounds that, medical evidence notwithstanding, her pregnancy was too developed.<sup>121</sup> Though it was reversed on appeal, the case underscores the crucial significance for law of timing and dates. As the Women’s Law Project in Philadelphia counsels teens, “[d]o not delay calling for an appointment just because you haven’t raised the full fee.”<sup>122</sup>

The Pennsylvania case also highlights the particular problems of pregnant minors in state care. Florida policy forbids social workers from authorizing an abortion for anyone under the supervision of the Department of Child and Family Services.<sup>123</sup> Because most foster children are unable or

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<sup>117</sup> *Id.* at 520. (Johnstone, J., concurring). Justice Johnstone concurred because “a remand leaves [the minor] with a theoretical hope” and “will allow [her] further opportunity to introduce even more evidence of her maturity, knowledge, and best interests.” *Id.*

<sup>118</sup> *In re Jane Doe*, 19 S.W.3d 346, 356 n.11 (Tex. 2000).

<sup>119</sup> *Id.* at 354.

<sup>120</sup> *In re L.D.F.*, 820 A.2d 714, 715 (Pa. 2003).

<sup>121</sup> *Id.*

<sup>122</sup> WOMEN’S LAW PROJECT, *supra* note 56, at 2. A few private organizations attempt to fund abortions for indigent women, young and old; for more, see National Network of Abortion Funds, Connecting Rights to Resources, <http://www.nnaf.org/> (last visited Oct. 1, 2009).

<sup>123</sup> Carl Hiaasen, *DCF Policy: Forcing Babies to Have Babies*, MIAMI HERALD, May 1, 2005, at 1L (commenting on case of L.G.); see also *Ex parte Anonymous*, 531 So. 2d

unwilling to involve their actual parents, the inability of foster parents or social workers to consent places a near impossible burden on a minor's access to abortion. Other categories of pregnant teenagers find themselves similarly stymied. These include both minors living informally with grandparents or other relatives<sup>124</sup> and minors whose parents are physically absent—whether in prison, in the armed services, or in another country—and therefore may be unable to participate in a timely way. Other parents may be present in the United States illegally and afraid to sign an official paper, especially one that must be notarized.<sup>125</sup>

The problem of delay is intensified by the operation of bypass process itself. As the painstaking state-by-state investigations of Helena Silverstein have made clear, in many counties the official players in the system, from court clerks to judges, often know very little about the hearings: what they are, what the state is obligated to provide, how minors are to proceed, and so on.<sup>126</sup> Within any one state, practices often differ county to county, courthouse to courthouse, and judge to judge, further complicating the ability of lawyers to prepare their clients.

There is also the sheer difficulty of actually getting to court. Judges have heard testimony from petitioners who hitchhiked 40 miles over the course of four hours to get to the hearing on time. As one lawyer stated, “it’s difficult enough for a young woman to have to get out of school, come to a lawyer, get to the courthouse by 4:30 p.m. (usually earlier so we can catch a judge) and [to] do that a couple of times before the process is finished; so I can’t even imagine if they have to drive 300 miles.”<sup>127</sup>

This account puts to the side the difficulties of arranging and traveling to an abortion provider once a petition is granted.<sup>128</sup> Consider that, in Nebraska, the only three medical clinics that provide abortions in the

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901 (Ala. 1988) (reviewing state foster care agency’s refusal to authorize a minor’s abortion).

<sup>124</sup> See, e.g., *In re R.B.*, 790 So.2d 830 (Miss. 2001) (upholding the denial of a waiver of parental consent where the minor’s parents were dead and she was living with her grandmother); *In re Anonymous*, 812 So.2d 1221 (Ala. Civ. App. 2001) (upholding the denial of a waiver where the minor’s grandmother was her legal guardian).

<sup>125</sup> NAT’L P’SHIP FOR WOMEN & FAMILIES, *supra* note 59, at 10–12.

<sup>126</sup> See generally SILVERSTEIN, *supra* note 60. Silverstein acknowledges that things may have improved since she began her study. *Id.*

<sup>127</sup> *Id.* at 5.

<sup>128</sup> *Id.*



state are 450 miles or more from the state's western border; that two thirds of Georgia's providers are in Atlanta; and that Michigan has no providers above the thumb.<sup>129</sup>

There is also much we cannot consider because we simply don't know. The fact that most petitions are granted tells us almost nothing at all about how many girls are unable to petition in a timely way or who they are: their age, race, education, and family circumstances. We do know, however, that there are states, such as Mississippi, which have high teenage pregnancy rates and low teenage abortion rates, and where only a few bypass petitions are filed annually.<sup>130</sup>

### **B. The Risk of Public Exposure**

Despite the constitutional significance of anonymity, a minor's physical participation in the bypass process puts her at risk of exposure. As the New Jersey Supreme Court noted in striking down that state's parental notification law, the logistics of traveling to court, getting the forms, returning for the hearing, and waiting around outside the courtroom may compromise the young woman's anonymity.<sup>131</sup> Co-members of the community appearing in court to pay a parking fine or take out a hunting license may wonder what Jane is doing down there in the middle of the day. Bypass petitioners have bumped into schoolmates attending their own juvenile court hearings and parents have received anonymous letters from neighbors who saw their daughter in court.<sup>132</sup> In this regard, the availability of electronic forms and instructions is a huge help to minors—at least minors with printers—who can avoid the additional trip. It is worth noting that even minors who involve their parents cannot do so completely within

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<sup>129</sup> *Id.* at 4.

<sup>130</sup> Telephone Interview with Rachel Rebouché, Associate Director, Judicial Bypass Protect, National Partnership for Women & Families (Sept. 29, 2009) (on file with author).

<sup>131</sup> *Planned Parenthood of N.J. v. Farmer*, 762 A.2d 620, 636 (N.J. 2000).

<sup>132</sup> *Id.* In Massachusetts, minors are at the courthouse for approximately two hours and before a judge for between fifteen and thirty minutes; this is not an insubstantial time to have to account for one's activities. *Planned Parenthood League of Mass. v. Att'y Gen.*, 677 N.E.2d 101, 105 n.6 (Mass. 1997).

the confines of family privacy; at least six states require that parental signatures on notification and consent forms must also be notarized.<sup>133</sup>

There is also the ethically charged problem of what I call “revelation through appeal.” This occurs when an appellate opinion incorporates so much factual information from the trial record that despite the Jane Doe alias, the petitioner’s identity is susceptible to discovery. The problem of the decision itself compromising anonymity was the subject of ferocious debate among the justices of the Texas Supreme Court. Concurring in a 2000 bypass case, Justice Enoch challenged Justice Hecht for his “routine practice of revealing to the public ‘in complete detail’ the minor’s testimony . . . for no apparent jurisprudential purpose.”<sup>134</sup> Justice Enoch observed that, in a series of decisions, Hecht had written separately in order to “publish chapter and verse the minor’s confidential testimony. It would appear that Justice Hecht intends nothing more than to punish, as best he personally can, minors for seeking a judicial bypass. Although the law promises them confidentiality, he promises them notoriety.”<sup>135</sup>

It is important to remember what is at stake in abortion notoriety. It is not only that a minor’s parents may prevent her from going to a court or to a clinic. As Judge Richard Posner noted in refusing to release even the redacted medical records of late-term abortion patients, “skillful ‘Googlers’” might be able to “put two and two together, ‘out’ the . . . women, and thereby expose them to threats, humiliation, and obloquy.”<sup>136</sup> Similar concern was raised by the Fourth Circuit in a 2002 case concerning the confidentiality of medical records sought by the state:

[W]omen seeking abortions in South Carolina have a great deal more to fear than stigma. The protests designed to harass and intimidate women from entering abortion clinics, and the

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<sup>133</sup> See, e.g., ARK. CODE ANN. § 20-16-803 (2009); KAN. STAT. ANN. § 65-6705 (2008); LA. REV. STAT. ANN. § 40:1299.35.5 (2009); OKLA. STAT. tit. 63, § 1-740.2 (2009); S.D. CODIFIED LAWS § 34-23A-7 (2009); VA. CODE ANN. § 16.1-241 (2009).

<sup>134</sup> *In re Jane Doe*, 19 S.W.3d 346, 363 (Tex. 2000) (Enoch, J., concurring).

<sup>135</sup> *Id.* at 363. Justice Enoch felt particularly stymied by Hecht’s practices, stating that “[Hecht’s] disclosures leave the Court in an untenable position. The Court cannot respond because to do so would require it to reveal whatever other pieces of the record remain confidential.” *Id.*

<sup>136</sup> *N.W. Mem’l Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004).

violence inflicted on abortion providers, provide women with ample reason to fear for their physical safety.<sup>137</sup>

Pro-life groups have videotaped abortion patients entering medical clinics and posted their pictures on the web.<sup>138</sup> Others have turned over the names of minors entering clinics to law enforcement, arguing that the fact of their pregnancy is prima facie evidence of statutory rape.<sup>139</sup>

Even if the townsfolk are not out with pitchforks (or mini-cams), reputational consequences may attach from the revelation of pregnancy alone. Gossip about that subject is always interesting and has long been a basis of reputational injury.<sup>140</sup> A minor is sometimes just as concerned about her parents finding out she has had sex as she is about her parents finding out that she is pregnant; pregnancy is the evidence that the girl is not the trustworthy kind of daughter her parents thought she was.<sup>141</sup> Once a pregnancy is revealed, neighbors, friends, and church members will know that she has had sex, that she was not smart or careful about it, and that no boy has stepped forward to make things right.<sup>142</sup>

There are separate reputational implications for having or seeking an abortion. There is some evidence of decreasing support for legal abortion

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<sup>137</sup> *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control*, 317 F.3d 357, 377 (4th Cir. 2002).

<sup>138</sup> Yochi Dreazan, *In the Shadows: Photos of Women Who Get Abortions Go Up on Internet*, WALL ST. J. May 28, 2002, at A1 (reporting postings of women's pictures on Abortioncams.com and Christiangularry.com).

<sup>139</sup> David Pasztor, *Abortion Foes Involve Police in New Tactic*, AUSTIN AM. STATESMAN, Dec. 29, 2002, at A1.

<sup>140</sup> See also Mary Beth Norton, *Gender and Defamation in Seventeenth-Century Maryland*, 44 WM. & MARY Q. 3 (1987).

<sup>141</sup> "They are here because they don't want their parents to know that they are less than perfect." Catherine Candisky & Randall Edwards, *Pregnant Jane Does Often Intelligent, Scared*, COLUMBUS DISPATCH, Feb. 28, 1993, at 5B [hereinafter Candisky & Edwards, *Pregnant Jane Does*] (quoting Juvenile Court Judge Katherine Liss).

<sup>142</sup> Consider the fourteen-year-old pregnant minor, in foster care, who explained that she wanted an abortion in part because "her continued pregnancy and delivery of a child would affect her image with boys, who were bound to find out about it." *In re T.H.*, 484 N.E.2d 568, 569-70 (Ind. 1985). T.H. further explained that "she wished to continue her education and make something of herself." *Id.* The denial of her petition was upheld on appeal. *Id.* at 571.

among the young,<sup>143</sup> and despite the fact that about one in three women in the United States will have had an abortion during their reproductive years,<sup>144</sup> most are silent, if not secretive about it.<sup>145</sup> Such reticence is understandable: a powerful combination of forces—visual, political, commercial—has made the fetus into a vivid, personable, and for some an heroic presence.<sup>146</sup> Anyone who has sat in traffic knows that “Abortion Stops a Beating Heart” (bumper stickers) and the right thing to do is “Choose Life” (license plates).<sup>147</sup>

These messages may work, and perhaps work too well. Some young women find the revelation of an unwanted pregnancy so daunting and the idea of an abortion so unthinkable that they hide their pregnancies and abandon or kill their newborns. Acknowledging the phenomenon, nearly every state has enacted an “infant safe havens” law authorizing desperate young mothers to leave their newborns anonymously at designated locations, such as emergency rooms and fire stations.<sup>148</sup> Safe

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<sup>143</sup> See Elizabeth Hayt, *Surprise, Mom: I'm Against Abortion*, N.Y. TIMES, Mar. 30, 2003, at sec. 9 p. 1, available at <http://www.nytimes.com/2003/03/30/style/surprise-mom-i-m-against-abortion.html> (reporting that in 2002, fifty-four percent of college freshmen favored legal abortion, compared to sixty-seven percent a decade earlier); Susan Dominus, *The Mysterious Disappearance of Young Pro-Choice Women*, GLAMOUR, Aug. 2005, at 200–01 (reporting on the view that, because contraception is available, unwanted pregnancy is just carelessness and abortion therefore inexcusable).

<sup>144</sup> Guttmacher Inst., State Facts about Abortion: New York 2006, [http://www.guttmacher.org/pubs/sfaa/new\\_york.html](http://www.guttmacher.org/pubs/sfaa/new_york.html) (last visited Oct. 1, 2009) (concluding that, based on current abortion rates, “about one in three American women will have had an abortion by the time she reaches age 45.”).

<sup>145</sup> See Barbara Ehrenreich, *Owning Up to Abortion*, N.Y. TIMES, July 22, 2004, at A21 (observing that while “abortion is legal—it’s just not supposed to be mentioned or acknowledged as an acceptable option”). See also Alice Clapman, Note, *Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts to Protect Abortion Patients and Staff*, 112 YALE L.J. 1545 (2003).

<sup>146</sup> Sanger, *Legislating in the Culture of Life*, *supra* note 16, at 800–08, 821–28 (describing the religious and political development of the “culture of life” and the use of fetal ultrasound imagery to establish the fetus as an immediate presence, respectively).

<sup>147</sup> Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 641–44 (2008) (discussing the legality of states’ issuances of controversially themed license plates); Peggy Hau, *The Politics of Law, Language, & Morality: Thucydides & the Abortion Debate*, 8 S. CAL. INTERDISC. L.J. 711, 736 (1999) (discussing “Abortion Stops a Beating Heart” bumper stickers).

<sup>148</sup> See Sanger, *Legislating in the Culture of Life*, *supra* note 16, at 773 (“By 2005, only the Alaska, Vermont, and Nebraska legislatures had failed to pass Safe Haven laws.”).

haven laws are predicated on the incentive value of secrecy with regard to the resolution of an unwanted pregnancy. In contrast to the immobilized young women who are the targets of safe haven legislation, bypass petitioners have faced up to their situations, thought through their options, and have decided to take control of their lives within the bounds of the law. Their privacy is no less important to them than it is to others law has so elaborately sought to protect.

### C. Humiliation, Dread, and the Demands of Dignity

As discussed earlier, my concern is less with the impact of bypass hearings on a minor's *access* to abortion (however serious that may be) than with the harms wrought by virtue of participation in the process itself. Although most petitions are approved in the end, it is still important to give substantive content to what happens en route to the end. This section begins the inquiry into what is required of minors at the hearings and how they experience them, through the lens of dignitarian values.

Again, it is important to stress the distinctly legal character of the bypass enterprise. The hearings are a form of legal process that take place in a place of law and carry the formal indicia of law—there is a courtroom, judge, testimony, counsel, and court reporter. Dignity has a special resonance in this setting. Michelman has expressed these values, in the context of a litigant's access to a forum at all, as “reflecting concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate.”<sup>149</sup> While minors are not exactly litigants, concerns about self-respect apply equally in the context of petitioning.

In describing the workings of a trial, Robert Ferguson has observed that “[e]very trial is about an unhappiness that someone has been unable to stand, and every courtroom decision contains a mountain of misery for someone.”<sup>150</sup> A judicial bypass hearing may be less formal than a trial but it is no less momentous. Ferguson's phrase—a mountain of misery—captures well its unhappy character.

#### 1. Humiliation

Bypass hearings humiliate the girls who must participate in them. This is not because most judges are mean or intentionally harsh, although some certainly interrogate rather than question and lecture rather than

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<sup>149</sup> Michelman, *supra* note 27, at 1172.

<sup>150</sup> ROBERT FERGUSON, *THE TRIAL IN AMERICAN LIFE* 38 (2008).

assess. But the problem lies in the nature of the inquiry and not simply its manner. Bypass petitioners must testify before strangers regarding the most private matters in a teenager's life: the fact of sexual intercourse, the predicament of pregnancy, and the structure or disarray of home life that make petitioners believe they can not involve their parents. Girls are asked about their views on motherhood, their personal relationships, and their success (or struggles) in life so far. Such revelations are intensely difficult for teenage girls, as they would be even for adults who, at least since the pre-*Roe* days of hospital abortion review, have been spared the public display of such private accounting.<sup>151</sup>

Certainly, in the area of criminal law, care is taken to protect rape victims from having to testify unnecessarily about intimate issues. Under the Federal Rules of Evidence, questions about the witness's prior sexual history or sexual disposition are forbidden in criminal and in civil proceedings: "The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process."<sup>152</sup> In contrast, some bypass judges feel quite free to pose all manner of personal comments and questions to bypass petitioners. The state's interest in respecting those who come into court as victims should attach to those who come in as rights bearers.

In thinking about how the hearings work on teenagers, it is important to distinguish between embarrassment and humiliation. To reveal or confide the facts of a pregnancy to a sister, friend, or counselor might well be *embarrassing*. The sex, the pregnancy, or the relationship may have been a big mistake; one should have known better, been more careful or less trusting. But these same confidences register quite differently when their revelation is not a matter of private confession or counsel, but is instead compelled in court. These are the very subjects—sex, secrecy, mistakes—that make talk so very interesting when it takes the form of gossip and is about someone else.<sup>153</sup>

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<sup>151</sup> See generally Rickie Solinger, "A Complete Disaster": *Abortion and the Politics of Hospital Abortion Committees, 1950-1970*, 19 FEMINIST STUD. 241 (1993) [hereinafter Solinger, *A Complete Disaster*] (describing the use of hospital abortion boards composed of obstetricians and psychiatrists to decide if an abortion was necessary "to preserve the life" of pregnant women seeking a legal abortion.).

<sup>152</sup> FED. R. EVID. 412 advisory committee's note.

<sup>153</sup> PATRICIA ANN MEYER SPACKS, GOSSIP 11 (1985).

Bypass testimony requires something like gossiping about oneself. That only the judge and a few others—bailiff, court reporter, attorney—are present does little to diminish the magnitude of the intrusion. Anonymity and confidentiality provisions may protect bypass petitioners from the wider public view, but that is not the only sense in which something may be made public. A judge, even in a closed courtroom, represents the state. Bypass hearings require girls to reveal personal matters before a powerful public official. For minors, this is *not* a private hearing but a recitation in front of an important authoritative adult.

Moreover, humiliation does not necessarily depend on the presence of an audience. Consider a corporal punishment case from the European Court of Human Rights, in which the Court had to decide whether the “birching” (three strokes with a cane) of a fifteen-year-old boy by the local constable was degrading treatment under Article 3 of the Convention on Human Rights, which protects “a person’s dignity and physical integrity.”<sup>154</sup> The local authorities from the Isle of Man had argued that the birching was not degrading, in part because it took place in private and because the boy’s name was not published. In rejecting their argument, the Court observed:

“Publicity may be a relevant factor in assessing whether a punishment is ‘degrading’ . . . but the Court does not consider that absence of publicity will necessarily prevent a given punishment from falling into that category: *it may well suffice that the victim is humiliated in his own eyes, even if not in the eyes of others.*”<sup>155</sup>

Similarly, concern about the degrading treatment of detainees in Iraq and elsewhere has not depended on it being viewed by others. In some cases the debasement was displayed to others; in other cases it was not. Humiliation works because of how the treatment registers with the subjected person. Whatever the reasons may be for using humiliation in the interrogation setting, there is no proper account for its use on young women during a civil hearing.

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<sup>154</sup> See *Tyrer v. United Kingdom*, 26 EUR. CT. H.R. (ser A) ¶¶ 32–33 (1978). As the Court explained, “[t]he applicant was made to take down his trousers and underpants and bend over a table; he was held by two policemen whilst a third administered the punishment, pieces of the birch breaking at the first stroke. . . . The birching raised, but did not cut, the applicant’s skin and he was sore for about a week and a half afterwards.” *Id.* ¶ 10.

<sup>155</sup> *Id.* ¶ 32 (emphasis added).

## 2. Terror and Testimony

Courtrooms and courthouses are often intimidating settings, even for adults and even for litigants not testifying about unwanted pregnancy. Testimony by judges who hear bypass cases, by advocates who accompany petitioners, and by minors themselves make absolutely clear that the experience is one of anxiety and dread. A Minnesota judge described the level of apprehension of petitioners as worse than that of women seeking orders of protection for domestic violence.<sup>156</sup> A study of twenty-six Massachusetts minors whose petitions were all granted revealed a near universal fear that they would say something wrong and their petitions would be denied; this in a state where nearly all petitions are successful.<sup>157</sup> Lawyers who represent minors are aware of their distress and are hesitant to leave them alone in courthouse hallways.<sup>158</sup>

Even before the law steps in, these young women are unmarried, pregnant, and facing a profound set of decisions about the course their lives will take. In some respects, they are not unlike pregnant women: both groups must consider and weigh existing obligations and aspirations against those of motherhood. Of course, adult women who decide to end a pregnancy do not have to deliberate about the reasons for their decision out loud in court. They do not have to testify about the circumstances of intercourse, their mishaps with contraception, misgivings about pregnancy, or the nature of their relationships with those closest to them.

These are exactly the areas of inquiry pursued by courts in their attempts to assess the maturity of bypass petitioners. In response to questions from judges or from their own attorneys, young women have had to explain that they were impregnated by their own fathers,<sup>159</sup> had a prior abortion,<sup>160</sup> had intercourse with more than one man,<sup>161</sup> and experienced

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<sup>156</sup> *Hodgson v. Minnesota*, 648 F. Supp. 756, 766 (D. Minn. 1986), *rev'd*, 853 F.2d 1452 (8th Cir. 1988).

<sup>157</sup> J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens who Make the Abortion Decision without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61 (2003).

<sup>158</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 59, at 2.

<sup>159</sup> *In re Anonymous*, 678 So. 2d 783, 784 (Ala. Civ. App. 1996) (Fourteen-year-old petitioner testified that "her pregnancy resulted from sexual abuse practiced upon her by her father.").

<sup>160</sup> *See In re Jane Doe 1*, 566 N.E.2d 1181, 1181 (Ohio 1990) (petition denied).

<sup>161</sup> *Id.*



family violence (against them or against their mothers).<sup>162</sup> Girls have testified about depression and self-cutting following the death of a mother (displaying the scars to the court),<sup>163</sup> broken condoms,<sup>164</sup> discord between parents, and parental opposition to the prospect of an interracial child.<sup>165</sup>

The concern here is not whether these facts were accepted as grounds for maturity but rather that they had to be given at all. As the appellate record reveals, invasive lines of inquiry are accepted as valid routes to assessing maturity and best interests. Questions about home life, religious values, or attitudes about adoption may not be asked in every case, but, when they are, the resulting testimony is often disturbing. A grandmother pleads with the court to approve the petition on account of her granddaughter's depression.<sup>166</sup> As an experienced Texas bypass attorney explained:

These cases are hard on everyone. . . . You must ask a 17-year old why her family is dysfunctional. Odds are her boyfriend dumped her when he found out she was pregnant, and she is having the biggest crisis of her life. Now she has to go to court and tell a bunch of strangers about it. It's heartbreaking stuff.<sup>167</sup>

Judges are sometimes disdainful and harsh. A thirteen-year-old is mocked for having no job other than "detasseling corn."<sup>168</sup> More recently, a judge turned down a petition stating: "[T]he legislature, in its infinite wisdom, has determined that an unborn child who never has had even the

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<sup>162</sup> See *In re Doe 3*, 645 N.E.2d 134, 134–35 (Ohio Ct. App. 1994) (denial reversed on appeal); *In re Anonymous*, 711 So.2d 475, 475 (Ala. Civ. App. 1998).

<sup>163</sup> *In re A.W.*, 826 So.2d 1280, 1282 (Miss. 2002).

<sup>164</sup> *In re Jane Doe*, No. 02CA0067, 2002 WL 31492302, at \*2 (Ohio Ct. App. Sept. 16, 2002); *In re Doe*, 973 So.2d 548, 550 (Fla. Ct. App. 2008) (minor testified she was "doing everything . . . under the circumstances to try and prevent this from happening").

<sup>165</sup> *In re Jane Doe*, 2002 WL 31492302, at \*2.

<sup>166</sup> *In re A.W.*, 826 So.2d at 1282.

<sup>167</sup> Mark Donald, *Dissent over Consent*, TEX. LAW., Mar. 7, 2005, <http://www.law.com/jsp/PubArticle.jsp?id=900005424579> (quoting attorney Susan Hays).

<sup>168</sup> *In re Anonymous I*, 558 N.W.2d 784, 786 (Neb. 1997) (per curiam).

ability to do any wrong, could be put to death so that his mother can play [sports].”<sup>169</sup>

We should not lose sight of the consequences of judicial disapproval on minors. Girls whose petitions are denied understand that they have not been believed, despite their sworn testimony, and the appellate cases reveal a pervasive dismissiveness of minors’ reasons for not telling their parents. Minors’ concerns about being beaten<sup>170</sup> or thrown out of the house (as was the petitioner’s older sister when she got pregnant)<sup>171</sup> or about parental well-being (a depressed mother<sup>172</sup> or a violent stepfather who threatened the mother)<sup>173</sup> are discounted as mere excuses for not wanting to be in trouble. Of course minors do not want to get in trouble, and some may overestimate the severity of parental reaction. On the other hand, minors are likely to have it exactly right. They may uniquely understand the demands of their family’s interests (parents, stepparents, siblings) and their role in family caretaking and be able to gauge the emotional fall-out of an abortion on their families. Moreover, other facts can be arrayed against the judicial hypothesis that minors are exaggerating certain fears—for example, the potential for domestic violence among adult women required to notify their husbands about an abortion.<sup>174</sup> The same dynamic would seem to apply with even greater force in the case of minors obliged to notify parents.

Having one’s petition denied means that the minor has been officially declared incapable of assessing her own circumstances and needs in a court of law. The impact of this should not be underestimated. Robert Ferguson has noted that judges—or the “judicial figure”—enjoy

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<sup>169</sup> *In re Anonymous*, 905 So.2d 845, 850 (Ala. Civ. App. 2005) (quoting the trial judge).

<sup>170</sup> *In re Doe*, 645 N.E.2d 134, 134–35 (Ohio Ct. App. 1994).

<sup>171</sup> *See generally In re Anonymous*, 964 So.2d 1239 (Ala. Civ. App. 2007); *In re Anonymous*, 718 So.2d 64 (Ala. Civ. App. 1998).

<sup>172</sup> *In re Anonymous II*, 570 N.W.2d 836, 838 (Neb. 1997).

<sup>173</sup> *In re Anonymous*, 515 So.2d 1254, 1255 (Ala. Civ. App. 1987) (citing the minor’s concern that her abusive stepfather would “cause ‘a bunch of problems’ for her mother” if the mother consented to her daughter’s abortion). *See also In re Doe*, 645 N.E.2d 134 (Ohio Ct. App. 1994).

<sup>174</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 891–94 (1992) (discussing “justifiable fears of physical abuse” that spousal notification laws may cause).

unprecedented authority in a democracy: “[We] set judges apart.”<sup>175</sup> To be judged in court is a profound moment and hits hard, though on occasion, a ruling may exalt; one Texas attorney emphasizes to her clients in successful bypass cases that being designated a mature person in a court of law is something one can be very proud of.<sup>176</sup>

### 3. Dignity

Is it fair or appropriate to require that a minor undergo an ordeal by process as the price of deciding to end a pregnancy? Put another way, are there limits to what a pregnant girl should have to do as part of exercising her rights under *Roe*? Some may insist that the intimate information squeezed out of minors is necessary to evaluate their maturity, or that it isn’t really all *that* humiliating. No doubt teenagers experience some things as humiliating which may not be so from an objective point of view: consider the mere presence (or existence) of parents.

But the situations we are considering are surely humiliating for young girls if anything is. Bypass hearings concern matters that are not only private but perhaps disturbing, involving secrets about their bodies, their relationships, their religious beliefs, and how all of these map on to aspirations, whether imagined or concrete, for the future. A Florida judge denied a petition in part because, when asked if her decision had been difficult, the minor simply answered “yes.”<sup>177</sup> The appellate court affirmed, noting that “[t]he record before the trial judge fails . . . to advise the trial court of the *depth or duration of her deliberative process*.”<sup>178</sup> But deliberation is exactly the aspect of abortion decision-making that ought to be protected. The decision encompasses a range of deeply personal, often self-defining preferences and commitments and these should not be on inspection.

Some might argue that while dignity is the proper measure for the treatment of adults before the law, its application is less necessary when applied to minors. They are, after all, still unformed and still subject to the control and discipline of others. They are not quite ready but only “destined for dignity.” Perhaps a little discipline in the form of a bypass hearing might

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<sup>175</sup> FERGUSON, *supra* note 150, at 30–31.

<sup>176</sup> Interview with Rita Lucido, Family Law Attorney (Dec. 30, 2008) (on file with author).

<sup>177</sup> *In re Doe*, 973 So.2d 548, 557 (Fla. Dist. Ct. App. 2008).

<sup>178</sup> *Id.* (emphasis added).

have a useful educational function. Certainly *parents* may chide, punish, and even humiliate their children almost as they see fit.

But judges stand in a different relation to children than do parents. Judges are representatives of the state, and minors are not the subjects of their parental custody. Some judges, however well intentioned, seem to have gotten confused on the point. As a Florida trial court judge stated to one young woman after denying her petition:

Miss, I know this seems like the most terrible thing in the world. And, I will tell you, as I indicated, a father of two daughters, and I want you to know that I am Catholic. And, I have always told my daughters, whatever it is, you can discuss it with me. And at a certain point, I will also tell you, that I have always told them, regardless of what I might think, if something happened to you, that would be your decision and whatever decision you make, I will support you.

I'm not telling you that you can or cannot terminate that pregnancy. I just think, in your best interest, where you are going to have to go through with it with your parents, it would be best for you to notify your parents. And, I am sure they love you.<sup>179</sup>

Another judge stated: "Let me just say, I'm very concerned about this young lady's welfare. Like counsel, I'm a mother."<sup>180</sup> This confusion of roles is particularly problematic in a hearing that is an express alternative to parental involvement. Bypass petitioners are citizens as well as children, however incomplete their citizenship may be.

The law has rejected subjecting children to forms of humiliation on constitutional grounds in other circumstances. In *Safford Unified School District v. Redding*, the Supreme Court considered the search of an eighth grader by school officials who had been looking for over-the-counter painkillers.<sup>181</sup> Informed by another student that 13 year old Savana Redding had the contraband in her notebook, the vice-principal searched the notebook. When no pills were found, he directed the school nurse and a

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<sup>179</sup> *In re Doe*, 973 So.2d 548, 565 (Fla. Ct. App. 2008). The denial of the petition was upheld on appeal. *Id.*

<sup>180</sup> *Ex parte Anonymous*, 803 So.2d 542, 561 (Ala. 2001) (rejecting the minor's petition); *see also In re Doe* 924 So.2d 935 (Fla. Dist. Ct. App. 2006) (reversing the trial court and noting that the trial court had observed that it "has four children of its own and once was a seventeen year old himself.").

<sup>181</sup> *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2638–42 (2009).

woman assistant to have Redding “remove her clothes down to her underwear, and then ‘pull out’ her bra and the elastic band on her underpants.”<sup>182</sup> Redding challenged the search as unreasonable under the Fourth Amendment. In its decision, the Court found that the school officials had immunity, but it agreed with Redding about the search itself. Because there had been no reason to suspect that the pills were in Redding’s undergarments (as opposed to in her notebook), a search that “necessarily exposed her breasts and pelvic area to some degree” was impermissible.<sup>183</sup>

In finding the examination of Redding’s body had been “excessively intrusive,” the Court applied the established school-search standard requiring officials to take account of “the age and sex of the student and the nature of the infraction.”<sup>184</sup> It concluded this thirteen year old girl’s “subjective expectation of privacy against such a search was inherent in her account of it as embarrassing, frightening, and humiliating.”<sup>185</sup> The Court contextualized the nature as well as the mechanics of the search. Unlike getting undressed for a gym class, “exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities . . . have banned [strip searches in schools] no matter what the facts may be.”<sup>186</sup>

Bypass petitioners are not subject to body searches but instead to questions about their bodies. What they are asked to talk about—an actual pregnancy, sexual relations, the details of the abortion procedure—is not a physical examination, but in some ways it comes close. While many bypass petitioners are sixteen and seventeen, some, like Redding, are only thirteen; responding to such questions might reasonably and subjectively be experienced as humiliating at any age. Like the search of Redding’s underpants, bypass questioning takes place in an official formal site—a courtroom instead of the principal’s office—and similarly is conducted by formidable adults. Despite the absence of a legal infraction, the aura of accusation hangs over bypass hearings.

Of course, what is missing in the bypass context is a search as defined for Fourth Amendment purposes. Nonetheless, the *Redding* case is

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<sup>182</sup> *Id.* at 2641.

<sup>183</sup> *Id.* at 2635–37.

<sup>184</sup> *Id.* at 2639.

<sup>185</sup> *Id.* at 2641.

<sup>186</sup> *Id.* at 2642.

helpful in thinking about what constitutes the respectful treatment of young people required to interact with the state even in a civil setting. As the Supreme Court concluded in *Redding*, “[t]he meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.”<sup>187</sup> As a distinct form of legal hearing, bypass hearings are also in a category of their own. What other forum requires the revelation of such intimate deliberation as a prerequisite for exercising a constitutional right?

Consider also the school cases in which minors have resisted saluting or praying in school on First Amendment grounds. In response to such complaints, school boards offered an opt-out provision: students who did not wish to pray or salute could leave the room, or otherwise demonstrably decline to participate. Yet the Supreme Court rejected this response in part because of the subjective costs to the students of opting out. As the Court stated in *Lee v. Weisman*, in which students could decline to participate in prayer during their high school graduation ceremony,

[t]he undeniable fact is that the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.<sup>188</sup>

Weighing the experiential costs to students, the Court found that opt-out provisions were themselves a source of coercion.

The analogy here is a modest one; I simply note another context in which the law has paid attention to the dignitary interests of minors by taking seriously the concrete circumstances under which they are permitted to exercise their rights. The Court in *Lee* acknowledged that “[r]esearch in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”<sup>189</sup> While bypass hearings do not involve peer pressure, they do involve circumstantial pressure: the solemnity and unfamiliarity of the courthouse, court personnel, and language of law. Minors who have undergone bypass

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<sup>187</sup> *Id.* at 2643.

<sup>188</sup> *Lee v. Weisman*, 505 U.S. 577, 593 (1992).

<sup>189</sup> *Id.*

hearings have found the hearings to be the most difficult and intimidating part of the entire abortion experience.<sup>190</sup> Whether, in *Casey*'s terms, this is a "purpose" or simply an "effect," it is unquestionably a consequence, and one that implicates dignitarian interests.

#### 4. The Indignity of Exclusion

Minors' dignity is implicated by still another aspect of the bypass process. This is the practice of some judges not to hear—let alone rule on—bypass petitions *at all*. Some judges formally recuse themselves;<sup>191</sup> others simply have their clerks turn back petitions ("We don't do that in this county").<sup>192</sup> In one urban jurisdiction, only three judges out of pool of sixty hear bypass cases;<sup>193</sup> in another, lawyers have experienced "up to five recusals [from a single case] before it lands on someone who will take it."<sup>194</sup> In such cases, minors and their advocates may wait for another judge to take the calendar on another day, or they may travel to another county to file the petition and be heard.<sup>195</sup>

The practice has been effective; counties where judges shun cases record few if any bypass petitions. Because pregnant young women have little time to waste, they tend to file in counties where they have a chance to be heard, and where there also may be a medical clinic in case they prevail. In Ohio, for example, girls from all around the state tend to file in Cleveland, Akron, or Youngstown.<sup>196</sup> They do *not* file in Geauga County, where over a two year period *no* bypass cases were filed. When asked why no petitions had been filed in Geauga County for two years, the education

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<sup>190</sup> See J. SHOSHANNA EHRLICH, WHO DECIDES? THE ABORTION RIGHTS OF TEENS 130–137 (2006).

<sup>191</sup> Adam Liptak, *On Moral Grounds, Some Judges are Opting Out of Abortion Cases*, N.Y. TIMES, Sept. 4, 2005, at S1.

<sup>192</sup> Helena Silverstein, "Honey, I Have No Idea": Court Readiness to Handle Petitions to Waive Parental Consent for Abortion, 88 IOWA L. REV 75, 102 n.121 (2002).

<sup>193</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 59, at 16 (reported by judge in the jurisdiction).

<sup>194</sup> *Id.* at 15.

<sup>195</sup> Melissa Jacobs, *Are Courts Prepared to Handle Judicial Bypass Proceedings?*, 32 HUM. RTS. 4, Winter 2005, at 4.

<sup>196</sup> Stephen Koff, *Judges Set Own Abortion Consent Rules: Some Girls Try Court-shopping*, THE PLAIN DEALER, Jan. 17, 1993, at 1B.

chairman of the Geauga County Right to Life answered that “[m]aybe it’s because it’s more of a Christian place. We don’t have any abortionaries here. We don’t have any killing centers. And a lot of girls who are going to kill their babies don’t want anyone to see them.”<sup>197</sup> But although refusing to hear cases may deter teen petitions, it does not wholly prevent teen abortions. Public health records reveal that eighteen minors from Geauga County had abortions over the same two year period.<sup>198</sup> The cost of obtaining the abortion has simply been made dearer.

This informal system of forum deprivation is deeply problematic, and I discuss its impact on law’s legitimacy below. Here, however, I want simply to expose its dignitarian consequences, as young women scramble to find a court where they can be heard. Most women, even young ones, have a pretty good sense of abortion’s disfavored status under the law. They may not have the vocabulary of “hyperregulation” but they know there is something suspect about a medical procedure treated so differently from all others. Denying young women a legal forum takes things up a notch. Forum exclusion tells them that their claim falls below the requirements of justice and that the problem of how to gain access to the courts is theirs alone to solve. This is more than an inconvenience. It is an affront to the status and self-worth that participation in legal process bestows and it should be recognized as such.

Tucked into dignitarian concerns are two other closely related concerns: participation and effectuation values. Identified by Frank Michelman in the context of due process decisions regarding litigation access,<sup>199</sup> each of these implicates the dignity of bypass petitioners. Participation values reflect “an appreciation of litigation as one of the modes in which persons exert influence, or have their wills ‘counted,’ in societal decisions they care about.”<sup>200</sup> The expressed will of bypass petitioners can only be counted through the operation of the hearing offered as a constitutional substitute for the decisional authority established in *Roe*. In the bypass context, participation lies cheek by jowl with what Michelman has called the effectuation value, which “see[s] litigation as an important means through which persons are entitled to get, or are given assurance of

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Michelman, *supra* note 27, at 1172–73.

<sup>200</sup> *Id.* at 1172.



having, whatever we are pleased to regard as rightfully theirs.”<sup>201</sup> Bypass hearings are not only an important means, they are the *only* legal means by which a pregnant minor can proceed, at least in thirty four states. Perhaps the problem is that “we,” or at least a good number of us, are *not* pleased to regard an abortion decision as rightfully theirs. On this account, denying minors the chance to effectuate their decision may, at a practical level, seem more like local justice than an indignity.

#### IV. COMPELLING NARRATIVE

What is the significance of using a judicial hearing as the means of supervising teenage abortion? To explore the question, this Part looks at other hearings in which the content and tone of a petitioner’s plea is crucial to the outcome. One distant but intriguing example of what I have in mind is found in Natalie Zemon Davis’s study of sixteenth-century French letters of remission, or “pardon tales.”<sup>202</sup> It is helpful at times to stand back from the preoccupation with particular concerns and look at other forums of supplication: their operation, their structures, and the uses to which they were put. I look as well at a few examples closer to home and suggest parallels between bypass hearings and modern American parole hearings and defendant allocutions. As with other analogies, my aim is to illustrate and to help articulate misgivings which we feel almost instinctively about the bypass process.

In looking at hearings across continents and centuries, I consider hearings as a genre or type of legal proceeding and so draw on insights from genre theory. As Alistair Fowler has explained, genres operate by means of “shared but more or less unconscious and unformulated grammatical rules.”<sup>203</sup> “Every genre has a unique repertoire, from which its representatives select characteristics”; some are matters of form and some are substantive.<sup>204</sup> In literary genres such as the novel, these include such features as length, setting, character types, character names, and so on. Similar features, some matters of form or procedure and some substantive, also cast light on how the bypass hearing, as a type of legal process, conveys meaning both to its participants and to a wider social audience.

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<sup>201</sup> *Id.* at 1173.

<sup>202</sup> NATALIE ZEMON DAVIS, *FICTION IN THE ARCHIVE: PARDON TALES AND THEIR TELLERS IN SIXTEENTH-CENTURY FRANCE* (1987).

<sup>203</sup> ALASTAIR FOWLER, *KINDS OF LITERATURE: AN INTRODUCTION TO THE THEORY OF GENRE AND MODES* 20 (1982).

<sup>204</sup> *Id.* at 55.

Thinking about hearings as a genre is something of a challenge in that the concept of a hearing includes such a wide range of legal events. In general, a “hearing” is a non-technical term used to describe an occasion when a person presents argument or evidence before an official legal officer in a situation short of a trial.<sup>205</sup> Even this general description produces a set of characteristics, such as a degree of informality, as a feature of the process. Hearings also involve some form of request or plea made before and resolved by a legal authority. It is important to keep these general features—informality, plea, decision-maker, resolution—in mind as they combine with the distinctive aspects of bypass hearings. These include the petitioner’s anonymity, her minority, the origins of her plea in a right, and the highly politicized nature of the hearing’s content—a decision about abortion.

#### A. Pardon Tales

Because much about the structure and purposes of French pardon tales parallels aspects of modern bypass hearings, I discuss the tales in some detail. Pardon tales or letters of remission were pleas by wrongdoers, mostly men, who had committed capital offenses and wished to ask for the king’s mercy.<sup>206</sup> The requests took the form of letters written to the king in which the supplicants sought to explain what had happened and why they should be forgiven. Written in the third person, the letters attempted “to make sense of the unexpected and build coherence” by showing that their wrongful behavior had resulted from unusual circumstances and was

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<sup>205</sup> I thank Robert Ferguson for this discussion.

<sup>206</sup> DAVIS, *supra* note 202, at 7–8. The process required several steps, each of which involved a presentation of the supplicant’s story. The supplicant had to get permission from a chancellery officer even to have a royal notary write up the story, sometimes with the help of an attorney. The letter was then read aloud before a chancellor, where it was discussed and examined. Only then, and only if the act was remissible and the excuses acceptable, would the letter receive the royal seal. The supplicant then took the sealed letter to a royal court for ratification. At this stage, which could last several months, the judges interrogated the supplicant, witnesses, and relatives of the deceased to corroborate the story told in the letter and to vouch for the supplicant’s past “good life and conversation.” There were risks in seeking pardon. If the letter was dismissed, the offender would have to stand trial, already having admitted to committing the act. Nonetheless, the remission process had serious advantages: no testimony by the offender under torture and the supplicant’s own story “set the frame for all the questioning and comparing of testimony that followed.” *Id.* at 8–14.

therefore both understandable and uncharacteristic.<sup>207</sup> For example, letters would often locate the killing within festive days, when the excitement of wine and dancing and resulting jealousies and quarrels might explain the how the crime came about.<sup>208</sup> Letters succeeded through the supplicant's ability to present a persuasive tale about why he should be pardoned. As Davis notes, they showed "narrative skills at work in realistic and self-interested persuasion."<sup>209</sup>

How did the ordinary wrong-doer bring this about? Pardon tales came not only from knights and gentlemen, but also from "the lips of lower orders."<sup>210</sup> How were regular folk able to craft a sufficiently persuasive tale? The answer is in part that the letters were collaborations between supplicants, royal notaries, and on occasion, lawyers. After hearing the supplicant's story, the notaries would write up a draft, often embellishing it in order to present the supplicant as more sympathetic or more well-connected.<sup>211</sup> For those who could afford it, lawyers would then fine-tune the letter to make sure that the story met the demands of lawful excuse; for example, by clarifying that the murder weapon had not been specially procured for the act.<sup>212</sup>

Yet despite this collaborative construction, the primary voice in the pardon tale was the supplicant's, and for two quite sensible reasons. The first concerned the very nature of royal pardon seeking: the letter was understood as "a personal exchange, a subject's voice speaking to the king

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<sup>207</sup> *Id.* at 4. Successful letters "recreated for readers and for hearers a situation where the supplicant became all of a sudden justifiably or understandably heated up and may have feared for his or her life." *Id.* at 37.

<sup>208</sup> Certain narrative conventions were common in what Davis identifies as the "anger plots" of the letters; "[e]xchanged, demanded, stolen, and especially knocked off, hats triggered trouble in remission stories." *Id.* at 38. Women's tales, in contrast, often focused on problems around meal preparation. *Id.*

<sup>209</sup> *Id.* at 111.

<sup>210</sup> *Id.* at 5.

<sup>211</sup> A notary might "fatten the preamble" by describing the supplicant as a "poor simple miller," or a "poor disabled widow." *Id.* at 16. Notaries would aver that "in all other situations [the supplicant] has always governed himself honestly and well . . . without ever having been reproved, attainted, or convicted of any other vile action . . . or done anything worthy of blame." *Id.*

<sup>212</sup> *Id.* at 17. Another ground for lawful excuse was that the victim had forgiven the supplicant before dying.

and the merciful king responding.”<sup>213</sup> Second were the realities of truth telling. A story that was faithful to the supplicant’s own speech and memory was more likely to stand if later challenged by witnesses. Thus, although the letters may have resulted from “an exchange among several people about events, points of law, and chancellery style,”<sup>214</sup> Davis concludes that they “can still be analyzed in terms of the life and values of the person seeking to save his neck by a story.”<sup>215</sup>

Supplicants were up to the task because even “the unlearned among them did not come to their request for pardon innocent of storytelling skills.”<sup>216</sup> Indeed, Davis observes that information about successful pardon seeking was widely available, “as necessary to villagers as information about dowry customs was to any wife.”<sup>217</sup> Supplicants often showed up at the notary’s office “with a story in mind and, in the case of a literate person, perhaps with a draft.”<sup>218</sup> They understood the “literary strategies” of a good pardon tale—what had to be said and how.<sup>219</sup> Thus the avenged grievance must have been unexpected, the supplicant’s anger appropriate to his station, and his regret obvious.<sup>220</sup> Details were concrete, sometimes chatty, so that the tale became a snapshot of an ordinary life gone suddenly awry.

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<sup>213</sup> *Id.* at 20. At the court hearing one would literally beg for the king’s grace by “present[ing] oneself humbly to the judges, bare-headed, on one’s knees and with imploring hands.” *Id.* at 11.

<sup>214</sup> *Id.* at 5.

<sup>215</sup> *Id.* at 25. One is also put in mind of the historical “neck verses”: “As a means of ensuring the clergy’s right to be tried by ecclesiastical courts, English law provided that anyone capable of reciting the 51st Psalm (the ‘neck verse’) could not be sentenced to death in the royal courts.” Charles J. Reid, Jr., *Tyburn, Thanatos, and Marxist Historiography: The Case of the London Hanged*, 79 *CORNELL L. REV.* 1158, 1186–87 (1994). Because women were not able to be ordained, they were never eligible to have the “benefit of clergy.” John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 *U. CHI. L. REV.* 1, 39 (1983).

<sup>216</sup> DAVIS, *supra* note 202, at 18.

<sup>217</sup> *Id.* at 19.

<sup>218</sup> *Id.* at 20.

<sup>219</sup> *Id.* at 17–20. Davis explains that pardon seekers drew on a variety of local sources: the practice of religious confession, stories from earlier successful petitioners or from notaries, regular evening gatherings where local events often took shape as song, popular “*nouvelles*,” family histories, and common wisdom about indicia of guilt. *Id.*

<sup>220</sup> *Id.* at 43.

## B. Bypass Hearings and the Constraints of Genre

As stylized forms of a plea, pardon tales and bypass procedures have much in common. From a structural point of view, the letters are, as Davis notes, a “mixed genre: a judicial supplication to persuade the king and courts, a historical account of one’s past actions, and a story.”<sup>221</sup> Bypass narratives similarly seek to persuade by accounting for past actions. Minors must organize the circumstances of their predicament and their desire to abort into a compelling, convincing narrative. Because the hearings are a live colloquy between petitioner, lawyer, and judge, the minor’s presentation is likely to be less polished than the written pardon tale. This immediacy puts increased pressure on the hearing and on whatever limited preparation between a petitioner and her attorney precedes it.<sup>222</sup> Nonetheless, the task of both the pardon tale and the bypass testimony is similar: to establish a picture of someone worthy of the court’s favor, an ordinary person seeking extraordinary relief on the strength of the presentation.

To do this in the bypass context, the petitioner must situate herself as having acted out of character in the events leading up to the hearing. This is part of the vocabulary of the genre. The sixteenth century supplicant could invoke a standard set of conventions—the passions of festival time and so on—to explain why he had acted hotheadedly. In some respects, the modern minor has a more difficult challenge: she must explain how a girl who stands before the court pregnant and unmarried is mature enough to decide about abortion, an act that for some judges is worse than what she has already done. The best she can do is to rely on a set of familiar teenage conventions to prove her upstanding character: the part-time job, good grades, activities in school, plans for college. Note that the minor must also argue in a delicate alternative: first that she is mature enough to make the decision, but in case that fails, that she is too hapless to take on the responsibilities of motherhood and it is therefore in her best interest to have an abortion.<sup>223</sup>

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<sup>221</sup> *Id.* at 4.

<sup>222</sup> A lawyer from a well staffed jurisdiction described the process: “We have enough pro bono attorneys ready to drop everything so that the clerk’s office can find one of us to get down there, spend fifteen minutes with the client to prepare for the hearings, get to the hearing, and get the order.” NAT’L P’SHIP FOR WOMEN & FAMILIES, *supra* note 59, at 5.

<sup>223</sup> *See supra* text accompanying notes 81–88.

Her performative task is made the harder, however, by two distinct aspects of the hearings. The first concerns the relation between the *manner* in which petitioners testify and the court's assessment of their maturity. The second concerns the problematic position of the minor. From the very start of the bypass process, certain structural features make her appear an unreliable witness, an unreliable girl.

### 1. Manner and Maturity

In deciding whether or not a minor is mature, trial judges are entitled to “draw inferences from the minor’s composure, analytic ability, appearance, thoughtfulness, tone of voice, expressions, and her ability to articulate her reasoning and conclusions.”<sup>224</sup> Yet a lack of composure should not be surprising in the bypass context. As a Minnesota judge observed, “[y]ou see all the typical things that you would see with somebody under incredible amounts of stress, answering monosyllabically, tone of voice, tenor of voice, shaky, wringing of hands, you know, one young lady had her—her hands were turning blue and it was warm in my office.”<sup>225</sup>

Stammering and other inadequacies of speech such as slang or blurting have counted against petitioners and been accepted as proof of immaturity. For example, when asked if she understood the risks involved in abortion, a thirteen-year-old petitioner answered, “Well, I hear you have bad cramps or you may get something up inside you that could cause risks”; when asked about childbirth, she replied that she “wouldn’t be able to go through with that.”<sup>226</sup> The court concluded that the minor was “unable to communicate . . . a sufficient understanding of the medical procedure involved, the associated risks, or of the alternatives to abortion.”<sup>227</sup> Yet even petitions from highly articulate minors have been denied. An Alabama minor answered similar questions about risks by stating:

You could have an infection if you don’t take care of yourself afterwards. Sterilization if the instruments they use are not properly cleaned. You could have bleeding because you bleed

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<sup>224</sup> *In re Anonymous*, 806 So. 2d 1269, 1274 (Ala. 2001).

<sup>225</sup> *Hodgson v. Minnesota*, 648 F. Supp. 756, 766 (D. Minn. 1986), *rev’d*, 853 F.2d 1452 (8th Cir. 1988).

<sup>226</sup> *In re Petition of Anonymous*, 558 N.W.2d 784, 787 (Neb. 1997).

<sup>227</sup> *Id.*

after you've had the abortion. You could have—what was the other one they told me—death, the main one, I guess. But they said that's always a factor.<sup>228</sup>

She too was found to be immature and insufficiently informed because she had not spoken personally to the physician who was to perform the abortion.<sup>229</sup>

The fact is that bypass petitioners are teenagers and many of them talk like teenagers. In presenting her reasons for seeking an abortion, a Texas petitioner explained:

[I]f I really put my cards on the table and look through them, I—I having a baby right now would probably stop 75 percent of what I want to do . . . . I know—I'm—like I said, I'm very busy. I have a lot of high goals, and having a baby would stop me from having them.<sup>230</sup>

Of course “pretty busy” isn't the best way to express why you would rather finish your education than have a baby and perhaps stammering sounds tentative. On another reading, however, the testimony seems honest and natural. Nonetheless, the Texas Supreme Court upheld the trial court's ruling that “a minor who was reluctant to carry her child to term because, at least in part, she was ‘pretty busy’ was not mature enough to make the [abortion] decision without parental guidance.”<sup>231</sup>

In some instances the minor's discomfort and its consequences for the quality of her testimony is intensified by the conduct of the judge himself. In a recent Florida case, the judge told the petitioner before denying the petition that:

You know your mother and father, especially your mother, are going to know that you are pregnant. And if she sees you, she will know. Major things happen to your body when you get pregnant, even if you have an abortion.<sup>232</sup>

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<sup>228</sup> *Ex parte* Anonymous, 803 So. 2d 542, 564 (Ala. 2001).

<sup>229</sup> *Id.*

<sup>230</sup> *In re* Jane Doe IV, 19 S.W.3d. 337, 344 (Tex. 2000).

<sup>231</sup> *Id.*

<sup>232</sup> *In re* Doe, 973 So. 2d 548, 564 (Fla. Ct. App. 2008).

Although the denial was upheld on appeal, a dissenting judge observed that “the [trial] judge’s improper and openly argumentative personal assertions likely would have intimidated most adults—indeed, most attorneys. It is not difficult to imagine the chilling effect that his behavior had on this young woman’s ability to elaborate on her situation.”<sup>233</sup>

There has also been a contrary complaint about the manner of minors’ testimony. This is not that the testimony is too casual but that it is too rehearsed. In an Alabama case, the petition was denied in part because the minor’s answers “appeared to be [given] in an almost rehearsed manner . . . [without] any expression of emotion.”<sup>234</sup> Upheld on appeal, a dissenting justice stated that “I cannot believe that the fact that the testimony of a party has been rehearsed indicates that the testimony is a lie . . . . Preparing a party for trial is not suborning perjury.”<sup>235</sup> But there are all sorts of ways to call a girl out. An Ohio minor testified that she was both planning to start using birth control and that she was not going to have sex again; her petition was denied in part on grounds of internal inconsistency.<sup>236</sup> Well, maybe, but it is not so hard to see how such contradictions come about when aspiration, reality, and the flustered desire to give the right answer come together in court.

## 2. The Structure of Stealth

A minor’s presentation of herself as a worthy object of the judicial favor is further complicated, if not compromised, by the very nature of the bypass process. The very name of a bypass hearing suggests an end run around *something*, and explains why some advocates prefer to call the hearings “waivers.”<sup>237</sup> There is also an uneasy fit between the procedural

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<sup>233</sup> *Id.* at 573.

<sup>234</sup> *Ex parte Anonymous*, 812 So. 2d 1234, 1236 (Ala. 2001). *See also* Khiara M. Bridges, *An Anthropological Meditation on Ex Parte Anonymous—A Judicial Bypass Procedure for an Adolescent’s Abortion*, 94 CAL. L. REV. 215 (2006).

<sup>235</sup> *Ex parte Anonymous*, 812 So.2d. at 1239 (Houston, J., dissenting).

<sup>236</sup> *In re Jane Doe*, 749 N.E.2d 807, 809 (Ohio Ct. App. 2001) (“[T]he trial court expressed concern regarding appellant’s credibility because she testified that she was ‘planning to get on birth control’ despite indicating that she would not continue to be sexually active.”).

<sup>237</sup> *See* NAT’L P’SHIP FOR WOMEN & FAMILIES, *supra* note 59, at 1. One judge has referred to the hearings as “backroom judicial bypass.” *Id.* at 3.



requirement of anonymity and the appearance of furtiveness produced by aspects of the requirement that cuts against the task at hand. Consider the many ways in which she appears untrustworthy and sneaky. By virtue of her petition, the court knows she has had sex and is a girl “in trouble.” She has literally snuck into court in order not to be seen, and she uses an alias or initials in order not to be known.<sup>238</sup> In the eyes of many, she is sneaking around the traditional laws of parental control; in the eyes of others, by seeking an abortion, she is trying to sneak around the very wages of sin.<sup>239</sup> To the extent the sixteenth century pardon-seeker could show that his wrongful conduct was a one-off, the bypass petitioner’s dissolute ways seem on-going.

Although these aspects of the hearing may cast bypass petitioners as “bad girls,” there is some irony here, for these are not the kids who typically turn up in court for misconduct. These are girls who have planned futures for themselves and believe that motherhood, at this stage of their lives, will take them off course. As one Ohio judge commented, “[t]he common denominator is that they are intelligent and have a lot on the ball.”<sup>240</sup> But for their pregnancies and their desire to abort, these are the “good girls.”

### 3. Gender and Narrative Demand

The concept of “good girls” raises an important distinction between bypass hearings and pardon tales: the role of gender in making one’s case. As Davis points out, few pardon seekers in sixteenth century France were women, their absence explained in part by the narrative demands of the plea.<sup>241</sup> Women who killed were “removed by cultural assumptions . . .

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<sup>238</sup> Fowler explains that there was a tradition against publishing the names of the gentry; the device of initials was therefore introduced to create the hint of scandal in high life.” FOWLER, *supra* note 203, at 86. Consider Jane Austen’s suppression in *Pride and Prejudice* of the name of the “\_\_\_\_\_ shire militia” to which the scandalous Wickham belonged, or as Fowler notes, in a later period, the “Histoire d’O.” *Id.* at 86 (citing JANE AUSTEN, *PRIDE AND PREJUDICE* 212, 274 (Scribner 1918)).

<sup>239</sup> I thank Sherry Colb for this last point.

<sup>240</sup> Candisky & Edwards, *Pregnant Jane Does*, *supra* note 141, at 5B.

<sup>241</sup> DAVIS, *supra* note 202, at 85. Out of 4,000 letters of remission, only one percent were from women. *Id.* For a discussion of gender in relation to political petitioning during the English Civil War, see Amanda Whiting, ‘Some Women Can Shift It Well Enough’: A Legal Context for Understanding the Women Petitioners of the Seventeenth Century English Revolution, 21 *AUSTRAL. FEM. L.J.* 77 (2004).

from the acceptable legal excuses of impulse.”<sup>242</sup> They were less able to depend on “ritual or festive settings to give workable coherence to their remission narratives” and generally had a much smaller range of explanatory settings that might have caused and could excuse their anger.<sup>243</sup> Crucial narrative elements of a successful pardon tale—cavorting in public, the unexpected insult, sudden anger, and subsequent remorse—were not available to them. Only killing to protect one’s sexual honor was an acceptable ground for seeking mercy, and in such cases women situated their stories within familiar household scenes, such as preparing meals.<sup>244</sup> Moreover, as Davis explains, because subjection was an everyday feature of women’s lives, “being on their knees in humble supplication” was a less impressive gesture than when displayed by a man.<sup>245</sup>

The absence of women pardon seekers was also a function of substantive law. The capital crimes most associated with women, witchcraft and infanticide, were simply not pardonable.<sup>246</sup> By the sixteenth century, the death of an unbaptized infant following a concealed pregnancy was evidence of sexual sin punishable by death.<sup>247</sup> Both family morality and royal majesty were better served by giving such a woman the justice she deserved; some acts were “too wicked for king’s pardon.”<sup>248</sup>

Of course, in contrast to French pardon seekers, *all* bypass petitioners are women. Yet the same problems that vexed women supplicants centuries ago are at work in the present setting: how to position oneself as worthy of judicial sympathy when the underlying act was sexual, secret, and sometimes consensual? How to make the error of one’s ways aberrational when the hearing itself underscores ongoing stealth? And

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<sup>242</sup> DAVIS, *supra* note 202, at 103.

<sup>243</sup> *Id.* at 104. Infanticide was widely considered a crime intended to cover up sexual misconduct, while the other common female crime—witchcraft—involved making a pact with the devil and thus “could not be excused.” *Id.* at 85.

<sup>244</sup> *Id.* at 96.

<sup>245</sup> *Id.* at 103–04. Davis suggests that the very ordinariness of women as supplicants may explain why they played such a peripheral a role in the theater of royal mercy. *Id.*

<sup>246</sup> *Id.* at 85. See generally DAVID I. KERTZER, SACRIFICED FOR HONOR: ITALIAN INFANT ABANDONMENT AND THE POLITICS OF REPRODUCTIVE CONTROL (1994).

<sup>247</sup> During the fourteenth and fifteenth centuries, infanticide was pardonable in cases where the baby had been baptized. DAVIS, *supra* note 202, at 85.

<sup>248</sup> *Id.* at 87.

finally, how to overcome the view in the eyes of some judges that despite its legality, abortion and infanticide are one and the same and that each is too wicked for the king's pardon?

### C. The Expression of Remorse

Although bypass hearings are organized around the court's determination about maturity, conveying a sense of remorse has in some instances become entwined in the process. Remorse has been understood as an aspect of rehabilitation and that, in turn, is a sign of maturity. The person is on the right path because the old one has been renounced. Depending on the judge, the successful petitioner's story will therefore include not only reports about grade point average and after-school jobs but also a satisfactory explanation as to why, despite rejecting her parents, adoption, and, by some lights, her fetus, the minor deserves to have her petition granted. This requires an appropriate shading of the tale, one that not only establishes maturity but gestures toward contrition for the mess she has gotten herself into and from which she now asks the court's help to escape.

This packaging of the story—in a sense this packaging of the self—creates harm of a quality that law has a unique power to bring about. The bypass petitioner swears to tell the truth but she also understands that something more (or less) is required. Like a defendant before a sentencing judge or an inmate before a parole board, she must present a version of herself that matches a set of expectations about what a remorseful defendant, a reformed parolee, or a contrite pregnant teenager looks like. In the case of sentencing or parole, guilt will have been established by the verdict, yet it has been crucial to the plea for a lesser sentence or early release that the defendants accept responsibility for their actions themselves.<sup>249</sup> As a popular jailhouse manual tells parolees, “[board] members will consider why the crime happened, whether you feel any remorse for the crime, and what you would do differently in the future.”<sup>250</sup> This is accomplished both by reciting the words and displaying the

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<sup>249</sup> See Lisa F. Orenstein, *Sentencing Leniency May Be Denied to Criminal Offenders Who Fail to Express Remorse at Allocution*, 56 MD. L. REV. 780, 780 (1997).

<sup>250</sup> See generally COLUMBIA HUM. RTS. L. REV., JAILHOUSE LAWYER'S MANUAL 937 (8th ed. 2009). The statutory condition for parole is “a reasonable probability that, if such inmate is released, he will live and remain at liberty without violating the law and that his release is not incompatible with the welfare of society and will not so deprecate the seriousness of his crime as to undermine respect for the law.” N.Y. COMP. CODES R. & REGS. tit. 9, § 8002.1(a) (2009).

appearance of a remorseful person.<sup>251</sup> Allocution before sentencing works much the same way. The Third Circuit has described it as:

[T]he opportunity [for the court] to evaluate the total person who stands at the bar of justice: to note the physical appearance and demeanor; the tone, temper and rhythm of speech; the facial expressions, the hands, the revealing look into the eyes. In sum, [the absence of allocution] deprives the judge of those impressions gleaned through the senses in any personal confrontation in which one attempts to assess the credibility or to evaluate the true moral fiber of another.<sup>252</sup>

There are several problems with requiring remorse as a condition to leniency in the criminal context. There is concern that this may violate a defendant's Fifth Amendment right to remain silent.<sup>253</sup> There is also the problem of defendants who, despite conviction, are innocent and therefore have nothing to repent. (This was the case with the four young men convicted in the "Central Park jogger" case.)<sup>254</sup> Moreover, even a remorseful defendant or parolee may be bad at *performing* remorse and is therefore demonstrably unconvincing. This may be a particular problem with juvenile defendants, who for developmental and social reasons may fail to display sufficient remorse and who have in consequence been removed from juvenile court to stand trial as an adult.<sup>255</sup>

My concern is less a bypass petitioner's inability to show remorse or contrition than whether the display should be required in the first place.

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<sup>251</sup> Erin Dougherty, Performance and Rhetorical Strategy in the Parole Hearing Testimony of Kathy Boudin (2005) (unpublished manuscript on file with author).

<sup>252</sup> Del Piano v. United States, 575 F.2d 1066, 1069 (3d Cir. 1978).

<sup>253</sup> Orenstein, *supra* note 249, at 780.

<sup>254</sup> Adam Liptak, *Not at All Remorseful, But Not Guilty Either*, N.Y. TIMES, Nov. 3, 2002, at D4. As one sentencing judge stated, "Nothing is going to be suspended because this gentleman does not have any remorse, none whatsoever . . . . All I wanted to hear from you is, you know, what implication you had this, in this, because you're an innocent. In your mind you're an innocent man. Well, I'm sorry." Jennings v. State, 664 A.2d 903, 905 (Md. Ct. App. 1995).

<sup>255</sup> Martha Grace Duncan, "*So Young and So Untender*": Remorseless Children and the Expectation of Law, 102 COLUM. L. REV. 1469 (2002). As one expert explained about the very look of juveniles in custody, "He slouches. He squirms. He's wearing funky clothing. The kid is scared. Kids probably don't have the expressive tools to adequately convey remorse even when they feel it, and yet it's held against them at sentencing." Liptak, *supra* note 254 (quoting Professor Jeffrey Fagan).

Bypass hearings are supposed to be about a minor's maturity, not her attitude. Yet advocates who represent minors are often aware that some judges want to hear some indication that she is sorry (whether for the pregnancy or the abortion isn't always clear), that this situation won't happen again (and some proof to back it up), and that she considers abortion to have moral implications that she has taken seriously.<sup>256</sup> Because the very structure of the bypass hearing situates minors as suspect, the expression of display or remorse is tricky. Talking to clergy or otherwise reflecting on one's religion as part of the decision-making process is sometimes regarded as an indication of moral responsibility, and some advocates urge their clients to consider doing so before the hearing.<sup>257</sup> Looking at the ultrasound images of one's fetus has also been taken as evidence that the minor took her decision seriously.<sup>258</sup> But the minor's "appreciation of the moral and religious dilemma presented by her decision" is a factor that courts have taken into consideration in a maturity determination.<sup>259</sup>

This is not to say that all questions pertaining to responsibility are improper. A measure of maturity might reasonably include a plan for contraception in the future so that the judge is more confident that the young woman will not again return to court for this reason. (Petitions have been denied where it was a minor's second pregnancy.)<sup>260</sup> Some advocates therefore prepare their clients for questioning on their current birth control practices, explaining its relevance to the client.<sup>261</sup>

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<sup>256</sup> E-mail Interviews with Reproductive Rights Advocates from Texas, Pennsylvania and Colorado (Mar. 17, 2009, Apr. 14, 2009, Apr. 20, 2009) (on file with author) [hereinafter Advocate Interviews].

<sup>257</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 59, at 14 ("Some judges question minors about the morality of abortion. One lawyer makes it a point to question a minor before the hearing about her religion . . . with one particular judge, her client might reply, 'I know it's a mortal sin but I believe my God is a compassionate God and He will forgive me.' Another lawyer tells her clients to talk to their pastors before the hearing so they can assure the judge they have done so.").

<sup>258</sup> *In re Jane Doe IV*, 19 S.W.3d 337, 339 (Tex. 2000).

<sup>259</sup> *In re Doe*, 967 So.2d 1017, 1020 (Fla. App. 2007); *see also In re Jane Doe*, 19 S.W.3d 346, 361 (Tex. 2000), in which the minor testified that "she understood that many women experience guilt after an abortion" but that "all of her choices would involve guilt, [and] that she felt most comfortable with the decision to have an abortion." *Id.*

<sup>260</sup> *See In re T.P.*, 475 N.E. 2d 312 (Ind. 1985); *see also Advocate Interviews, supra* note 256.

<sup>261</sup> Advocate Interviews, *supra* note 256.

There should be concern, however, when the law requires anyone to offer up a particular presentation of self or sentiment as a prerequisite to exercising a right. The practice is particularly objectionable in the fraught circumstances of a bypass hearing. As we have seen in the criminal context, much is at stake if the defendant is unconvincing or unwilling to show remorse. In seventeenth-century England, the condemned were expected to give a repentance speech from the gallows, broadcasting their acceptance of guilt and hope for redemption.<sup>262</sup> These were practices of criminal justice centuries ago. But pregnant girls should not have to assume a (moral) position or play a set piece in a contrived morality play when choosing to end a pregnancy.

My argument is not that the bypass system would be improved if only minors were encouraged to tell their own stories. The heart of the problem is less a matter of testimonial authenticity than that minors are required to tell stories in court at all. I recognize that this goes counter to advocates' insights regarding the importance of a client's "voice."<sup>263</sup> In her influential reflection on representing a welfare client at an administrative hearing for fraud, Lucie White analyzed how the hearing worked to shape Mrs. G's testimony into what White calls "subordinated speech."<sup>264</sup> The hearing was marked by intimidation (there was much to lose) and a kind of built-in humiliation (the client came into the process as a cheat). Each of these is familiar in the bypass setting.

To be sure, there are some impressive counterexamples of litigants who refuse subordination. Catherine Connolly has written about the "steadfast refusal" of certain lesbian clients to conform to society's expectations of family, even in the high-stakes context of a second-parent adoption.<sup>265</sup> This is all to the good, but we should keep in mind that these

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<sup>262</sup> James Anthony Sharpe, "Last Dying Speeches": Religion, Ideology and Public Execution in Seventeenth-Century England, 107 PAST & PRESENT 144, 156 (1985).

<sup>263</sup> For but two examples, see Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485 (1994); Patricia & Susan Silbey, *Subversive Stories and Hegemonic Tales: Towards a Sociology of Narrative*, 29 LAW & SOC. REV. 119 (1996).

<sup>264</sup> Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1, 6 (1990). White explains that although she prepared Mrs. G on what narrative strategy White thought was most likely to succeed, at the hearing Mrs. G refused to follow the script, gave her own account, and won (although it is not entirely clear exactly why she won). *Id.* at 19.

<sup>265</sup> Catherine Connolly, *The Voice of the Petitioner: The Experience of Gay and Lesbian Parents in Successful Second Parent Adoption Proceedings*, 36 LAW & SOC'Y REV. 325, 336-37 (2002).

were sophisticated, powerful adult litigants who had strategized about when and where to bring their actions. Connolly explains that her clients had chosen “to use the law only when they felt the time was ripe for them and their children.”<sup>266</sup> In contrast, bypass petitioners rarely appear in the peak of confidence. Certainly many must scramble to find a court in which to be heard at all, and few have any ability to “pick their moment,” since time, not timing, is crucial to them. Many lawyers do their best to secure respectful treatment for their bypass clients, but teenage abortion is not the right place to work on improving the integrity of client narrative. The courthouse is the wrong forum for pregnant minors to work out anything. What they have to say may be compelling, but it should not be compelled.

#### V. PURPOSE AND PUNISHMENT

Let us return for a moment to sixteenth-century France. It appears that by the middle of that century almost all letters of remission brought before the king were ratified.<sup>267</sup> This led to concerns that pardons were being granted too easily and granted to the well-connected rather than the deserving. Yet, despite such misgivings, the practice continued because in addition to pardoning wrongdoers, it also served important functions of state.<sup>268</sup> Remember that receiving a pardon required playing by the king’s rules. This meant presenting oneself as someone who had only momentarily lost control of an otherwise upstanding life. It is here that the demands of narrative worked smoothly with objectives of state building:

The habit of language insisted upon in the letters of remission and the roles in which supplicants were required to present themselves were among the civilizing mechanisms of the early modern French state, reminding people subjectively of the locus of power. . . .<sup>269</sup>

The fact that pardons were so generously granted led to their “double reputation” in the sixteenth century: “they were simultaneously believed in

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<sup>266</sup> *Id.* at 331, 338.

<sup>267</sup> Once the letter was ratified, “every penalty, fine, and corporal, criminal and civil injury which might be incurred as a result [of the act] be remitted” and the supplicant’s “good name and reputation and his goods” be restored. DAVIS, *supra* note 202, at 6.

<sup>268</sup> *Id.* at 57–58.

<sup>269</sup> *Id.*

as a needed mechanism for social peace and reintegration, and scoffed at as a sham.<sup>270</sup>

Like letters of remission, bypass petitions are also widely granted.<sup>271</sup> Might they also have the same double reputation as their sixteenth-century counterparts?<sup>272</sup> Part VI takes up the question of the hearings as sham, but here I want to consider how the hearings, like pardon tales, satisfy the needs of social order. To do this it helps to ask just what functions the hearings serve. The question of purpose is an important one: as citizens, we should reasonably expect to know the purpose of a law so that we can decide if that purpose is worthy as well as to assess whether the law accomplishes its intended purpose, or any other. While the bypass hearings may serve multiple purposes, I focus here on one. This is the use of bypass hearings to punish young women seeking an abortion. The hearings are a *deliberate* and rather clever form of punishment for a reproductive decision that is subject to no other form of state sanction because abortion is now legal. The hearings act as a sophisticated shaming mechanism, an engagement with law that appears on the up and up but that intensifies the minor's humiliation and fear (of participation, of exposure, of outcome) precisely because it takes place in a court of law. Moreover, I suggest that the harms experienced by virtue of the hearings are not simply incidental to the bypass process but are intended as an integral part of it.

### A. Deterrence

In characterizing bypass hearings as punitive, I use the word not in the criminal sense of the deprivation of liberty or a fine, but rather to describe action that is intended either as retribution or deterrent. We are familiar with this usage in other non-criminal contexts: punitive damages, punitive interest rates, and so on. The idea in all of these is to sanction and so to discourage behavior that is deemed offensive but that falls short of a criminal offense.

The idea of the hearings as a deterrent is interesting, although whether it is sex, pregnancy, or abortion that is to be deterred, it is hard to say. Most minors have no idea parental involvement laws exist until they discover they are pregnant and begin investigating their options. There is

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<sup>270</sup> *Id.* at 58.

<sup>271</sup> See *supra* note 111 and accompanying text for statistics on the rate at which bypass motions are typically granted.

<sup>272</sup> DAVIS, *supra* note 202, at 58.



nothing, for example, about parental involvement laws in present state sex-education curricula. To the extent these laws mean to deter anything, it seems to be the hearings themselves. While presented as alternatives—“your parents or a hearing”—the two are not offered up as equal choices. Girls are meant to choose the parental path on the understanding that something worse awaits them if they don’t. As one Texas Supreme Court justice candidly explained, “[o]nce a minor becomes aware of what she must go through to obtain a judicial bypass, she will choose for herself to involve her parents.”<sup>273</sup> Of course, the *in terrorem* effect does not work entirely as hoped. Hearings take place. Parents are bypassed. Indeed, it is impossible to measure the extent to which the bypass process works at all; we simply don’t know whether or how many girls decide to notify their parents when faced with a hearing. We do know, however, that more than half of all pregnant minors inform their parents even without a legal requirement to do so.<sup>274</sup> For those girls who petition, it seems that only the terror and not the effect remains.

But on the general point, let us not be coy. The bypass process is meant to prevent abortion. As four justices of the Alabama Supreme Court candidly stated:

[I]t seems clear that the [Alabama] legislature intended, in adopting the Parental Consent Statute, to preserve the life of the unborn, and that it deliberately was doing what it could within the constraints of the Federal Constitution, as interpreted by the Supreme Court of the United States, to accomplish that purpose.<sup>275</sup>

The means of preserving unborn life is understood to be parental suasion or control. Thus an Alabama judge held that the court lacked jurisdiction “to order the procedure sought in this matter which will result in the extinction of a four-month old human life when the child’s family is fully informed and able to make this decision.”<sup>276</sup> Of course, we don’t really know whether all parents would oppose their daughter’s decision; the Alabama judge might be as distressed if the minor’s family agreed with

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<sup>273</sup> *In re Jane Doe*, 19 S.W.3d 346, 363 (Tex. 2000) (Enoch, J., concurring).

<sup>274</sup> EHRlich, *supra* note 190, at 107.

<sup>275</sup> *In re Anonymous*, 720 So. 2d 497, 502–03 (Ala. 1998) (Hooper, C.J., concurring in part and dissenting in part).

<sup>276</sup> *In re Anonymous*, 678 So.2d 783, 784 (Ala. Civ. App. 1996).

their daughter, consented, and helped her arrange the abortion. In any event, as the Alabama Supreme Court justices themselves acknowledged, abortion is constitutionally protected. Legislating as close as possible to the permissible line as an expression of constitutional dismay doesn't seem good enough, especially when the exercise of a right and the quality of its exercise is at stake.

## B. Counseling and Consent

Might the hearings serve a counseling function? Certainly nothing in the statutes authorizes judges to do more than assess a minor's maturity and best interests. Moreover, most judges have no interest—and few have any training—in counseling minors about pregnancy resolution. Beyond disinterest and inability, there has been concern about the nature of counseling that has been offered. Some judges have been unwaveringly judgmental and moralistic: an Alaskan judge denied a minor's petition on the ground that it was “not an act of maturity on her part to put the burden of the death of this child upon the conscience of the Court”;<sup>277</sup> petitioners in Alabama have been ordered to undergo counseling at a pro-life pregnancy center called Sav-a-Life.<sup>278</sup>

This is not to say that counseling in general is a bad idea. It is a standard and valued service provided by private organizations such as Planned Parenthood and Jane's Due Process (JDP). A glimpse through the JDP booklet, *Legal Rights for Pregnant Teenagers in Texas*, is instructive: it offers nonjudgmental information on resources and services offered to minors, not just regarding abortion, but on parenting, adoption, education, emancipation and child support.<sup>279</sup> Indeed, to the extent that anything good has come out of the bypass process, it may be the extrajudicial system of assistance for pregnant minors that has in some places arisen in its wake.<sup>280</sup>

An additional justification for the hearings is that they ensure that the minor's consent will be voluntary. The issue of voluntariness appears

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<sup>277</sup> *In re Anonymous*, 905 So.2d 845, 848 (Ala. Civ. App. 2005). There is also concern that counseling provided from a Christian perspective raises First Amendment concerns. See generally Silverstein, *Anonymous*, *supra* note 90, at 107.

<sup>278</sup> *In re Anonymous*, 905 So.2d at 848 (“[T]his Court normally has required a petitioner to counsel with Sav-A-Life, or a similar pro-life organization.”).

<sup>279</sup> Jane's Due Process, *Legal Rights for Pregnant Teenagers in Texas*, <http://www.janesdueprocess.org/teens/legalrights> (last visited Oct. 1, 2009).

<sup>280</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 59, at 3, 7–8.

regularly in the politics of bypass enactment. The argument is that permitting teen abortion without parental involvement or a judicial hearing is simply a gift to abusive adult men who will impregnate girls and force them to abort. (Let us put aside cases where minors have been impregnated by their own fathers).<sup>281</sup> In the 2008 California initiative campaign, a leading pro-parental involvement message was “Stop Child Predators: On a daily basis, older men exploit young girls and use secret abortions to cover up their crimes.”<sup>282</sup> In a 2007 Mississippi case, that charge was extended to include mothers too. In *Sherron v. State*, a mother consented to an abortion for her fourteen year old daughter under the state parental involvement laws.<sup>283</sup> The pregnancy was the result of rape by the daughter’s stepfather. The mother was charged and convicted as an accessory after the fact to her husband’s crime of statutory rape for “giving the assistance that her daughter had to receive from one of her parents if she was to be permitted an abortion without a court order.”<sup>284</sup> The mother had argued that her sole intent in consenting was to help her daughter;<sup>285</sup> the daughter has testified that she had “no doubts about wanting to have an abortion. She did not want to give birth to and raise a child fathered by [her step-father].”<sup>286</sup> Nonetheless, the jury found sufficient evidence to suggest the mother’s motives in consenting were mixed and that consent for the abortion was given in part to hide her husband’s crime.<sup>287</sup> The court declined to rule on whether the criminal prosecution of a mother who consents to a daughter’s abortion unduly burdens the minor’s recognized constitutional right.<sup>288</sup>

Doctors too are viewed as sources of coercion. There is much pro-life discussion about the abortion “industry” and some of this has found its

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<sup>281</sup> See *id.* at 7 (noting how a staff member of a state department of social services mistakenly assumed that a twelve-year-old pregnant by her father needed her father’s consent to obtain an abortion).

<sup>282</sup> Sarah’s Law: Yes on 4, <http://www.yeson4.net/> (last visited Oct. 1, 2009).

<sup>283</sup> *Sherron v. State*, 959 So. 2d 30 (Miss. Ct. App. 2007).

<sup>284</sup> *Id.* at 36.

<sup>285</sup> *Id.* at 24.

<sup>286</sup> *Id.* at 33.

<sup>287</sup> *Id.* at 40–41 (upholding conviction because “[w]hen an act is done with multiple intents, it may be criminalized if one of the intents is an element of the relevant offense”).

<sup>288</sup> *Id.* at 36.

way into bypass decisions. An Alabama judge denied a petition on the ground that the minor was not sufficiently informed. Despite having received counseling from medical staff at a clinic, she had been unable to talk personally with the physician who would perform the abortion. The judge stated, “You know, these people are interested in one thing it appears to me and this is getting this young lady’s money. . . . This is a beautiful young girl with a bright future and she does not need to have a butcher get ahold of her.”<sup>289</sup> The denial was upheld on appeal. In this case, when asked about the specifics of the abortion procedure, the minor had testified that:

I understand they have a local anesthetic which they’ll give you anesthesia. They also have this oral medicine that you can take. When you take that, it numbs the bottom half of your body. And they would go in with an aspirator which is like a vacuum or sucking machine. And they go in there around the uterus wall and they just suck it out. That is what they [three different nurses at different clinics] told me.<sup>290</sup>

In all other forms of medical treatment, society trusts the physician to assess the quality of the patient’s consent.<sup>291</sup> Society is generally satisfied that doctors behave professionally with regard to the provision of services, and any lingering insecurities are assuaged by the presence of the tort system and a robust understanding within the medical community of the meaning of “battery.” Even for minors, there is little concern about coercion with regard to other medical care for which parental consent is not required, such as contraception or treatment for sexually transmitted diseases. In this respect, abortion is exceptional and judicial supervision duplicative. Physicians must always make an independent determination about the voluntariness of a patient’s consent. Maryland has codified this rule for teen abortion; a physician may perform an abortion on a minor if, in his professional judgment, “the minor is mature and capable of giving informed consent.”<sup>292</sup>

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<sup>289</sup> *Ex parte* Anonymous, 803 So. 2d 542, 554 (Ala. 2001).

<sup>290</sup> *Id.* at 564 (Johnstone, J., dissenting).

<sup>291</sup> Heather Boonstra & Elizabeth Nash, *Minors and the Right to Consent to Health Care*, GUTTMACHER REP. PUB. POL’Y, Aug. 2000, at 4, available at <http://www.guttmacher.org/pubs/tgr/03/4/gr030404.pdf>.

<sup>292</sup> MD. CODE ANN., HEALTH–GEN. § 20-103(c) (1) (i)–(iii) (West 2009).

### C. Bypass Symbolism

So we return to the question of what functions bypass hearings serve. Certainly they have expressive or symbolic value, though we want to look closely at just what they express before deciding the purpose is useful, benign, or deserving of support. For some, the legislation stands as a statement of opposition to abortion. But bypass symbolism goes beyond opposition to abortion because teenage abortion is more than a decision about reproduction. Bypass laws pull together a bundle of testy issues—teenage sexuality and sexual practices, parental and filial obedience, unwed motherhood and reproductive control. In the good old days, each of these was a matter of great interest to law. Until the 1970s, courts were formally on the side of parents. Sexual activity was a common basis of status offense jurisdiction over girls;<sup>293</sup> pregnancy was grounds for school expulsion. Maintaining this sense of moral order was upheld by the medical community as well as by law. Physicians who served on hospital committees that assessed women's requests for abortion were "very concerned with what they took to be their role in the postwar cultural mandate to protect and preserve the links between sexuality, femininity, marriage and maternity."<sup>294</sup>

But reform schools, maternity homes, and hospital abortion committees are now a thing of the past; pregnant high-schoolers are no longer expelled and abortion is legal. This is a matter of dismay for some. Parents particularly may feel that they are unsupported and that things have gone badly out of control. On this account, parental bypass legislation symbolizes resistance and perhaps a bit of nostalgia. It is not for nothing that Michigan calls its statute the Parental Rights Restoration Act.<sup>295</sup> The very existence of a parental involvement statute demonstrates that, in this state anyway, abortion is not available "on demand," especially for teenagers who have gone out and gotten themselves pregnant. It is, of course, important to keep in mind that abortion is not available "on demand" for anybody. Even adult women must comply with the sizeable set of requirements discussed earlier, and all of these apply to minors as well.<sup>296</sup>

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<sup>293</sup> See Rachel Devlin, *Female Juvenile Delinquency and the Problem of Sexual Authority in America, 1945-1965*, 9 YALE J.L. & HUMAN. 147 (1997).

<sup>294</sup> Solinger, *A Complete Disaster*, *supra* note 151, at 263.

<sup>295</sup> Parental Rights Restoration Act of 1990, MICH. COMP. LAWS SERV. §§ 722.901 et seq. (LexisNexis 2009).

<sup>296</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 59, at 12. These include waiting periods, which often require the minor to make two trips to the medical clinic, which

To be sure, the value of bypass hearings is not *only* symbolic. It is also political, to the extent the two can be pulled apart. Throughout the 1980s, support for parental involvement statutes proved crucial in several contested gubernatorial campaigns, including those of otherwise progressive governors like Bill Clinton and Christine Whitman, who, by supporting restrictions on abortion for daughters, successfully straddled the family values fence by being pro-choice and pro-parent at the same time.<sup>297</sup> Legislators can even manage to be pro-teen, if pressed, by supporting the therapeutic benefits of bypass hearings for minors' mental and physical health.

But there has to be a more robust answer to why bypass legislation makes any sense than the fact that it makes legislators and some parents look tough. If even in the face of a daunting hearing, girls are still going to court, and still succeeding, then it is important to understand what the hearings are about.

#### D. Punishment

Here we circle back to the deeply troubling hypothesis that bypass hearings operate as a form of punishment. The hearings cause, and are intended to cause, great distress to vulnerable young women who are already experiencing the predicaments of unwanted pregnancy in circumstances of perceived isolation from their families. As the Texas Supreme Court justice quoted above reminds us, bypass laws are meant to "sufficiently impress[] upon minors . . . that the State wants the parents to be informed."<sup>298</sup> But the impression has force only if the hearing is understood and functions as an ordeal. It is not hard to understand how that comes about. Unhappily pregnant girls learn when they seek medical care that in order to have an abortion they must first file papers, talk to a lawyer, testify in court, and each time review and rehearse details of their home lives, contraceptive failures, and private hopes for the future.

The hearings are, in short, the price young women are expected to pay for seeking an abortion and for having sex, and for doing both without owning up to their parents. As the presiding judge of an Ohio juvenile court

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may be at some distance, requiring her either to arrange transportation or stay overnight away from home. Both are problematic.

<sup>297</sup> WILLIAM SALETAN, BEARING RIGHT: HOW THE CONSERVATIVES WON THE ABORTION WAR 139 (2003).

<sup>298</sup> *In re Jane Doe*, 19 S.W.3d 346, 364 (Tex. 2000) (Enoch, J., concurring).

told a minor's attorney after denying the petition of his college-bound client, she had just not had enough "hard knocks."<sup>299</sup> Parents too sometimes regard bypass participation as the proper price of ending a pregnancy. Lawyers representing pregnant minors report that some parents have refused to consent after being asked by their daughter, even knowing that she is likely to succeed at the hearing: "You have to go through judicial bypass. This is your responsibility, not mine."<sup>300</sup> Interestingly, the "hard knock" school of thought also seems to apply to teenagers who decide not to abort. In describing the efforts of pregnant minors to continue their schooling, the head of Pregnant Related Services at the Texas Education Agency explained, "There are certainly districts where pregnancy is still punished . . . . Every year we get calls from parents and students saying their district just tells them, 'you've made your bed and now you lie in it because we're not going to help you.'"<sup>301</sup>

As these comments reveal, those who administer the law are indeed often able to "work their own view of substantive justice *into* the law."<sup>302</sup> At one level, the phenomenon is not surprising. As Malcolm Feeley has noted, "[t]he law is a normative ordering that touches people in an important way. Criminal justice officials are not exempt from this; most respond intensely to their tasks, and how they perform their duties is determined in part by their sense of justice."<sup>303</sup> Legal abortion offends the sense of justice of some judges. A Mississippi Supreme Court justice put it clearly in a 2001 opinion: "Ever since the abomination known as *Roe v. Wade* became the law of the land, the morality of our great nation has slipped ever so downwards to the point that the decision to spare the life of an unborn child has become an arbitrary decision based on convenience."<sup>304</sup>

I suspect the question will be raised: what's so bad about a little slap on the wrist by process if girls can get their abortions? One answer is that the law reserves punishment for those convicted of wrongdoing, and on

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<sup>299</sup> See *Cleveland Surgi-Center Inc. v. Jones*, 2 F.3d 686, 689 (6th Cir. 1993), *cert denied*, 510 U.S. 1046 (1994) (citing uncontroverted testimony regarding "Jane Doe IV").

<sup>300</sup> NAT'L P'SHIP FOR WOMEN & FAMILIES, *supra* note 59, at 2.

<sup>301</sup> Amber Hausenfluck, Comment, *A Pregnant Teenager's Right to Education in Texas*, 9 SCHOLAR 151, 169 (2006).

<sup>302</sup> FEELEY, *supra* note 34, at iii (emphasis added).

<sup>303</sup> *Id.* at 34.

<sup>304</sup> *R.B. v. State*, 790 So. 2d 830, 836 (Miss. 2001) (Easley, J., concurring). The Court upheld the denial of petition on appeal. *Id.*

that score, bypass petitioners don't qualify. They have filed a civil petition in a non-adversarial action: there is no prosecutor, no indictment, no sentencing. Even so, the procedure often "reads" as criminal all the way down. Bypass petitioners are clear about this. As one Massachusetts minor put it, "I'm only 16, and usually at this age, you know you don't see people going to court for good things."<sup>305</sup> It is as though if abortion can't be made illegal, it can still be made to *feel* illegal.

It is not enough to say that some people think that subjecting young women to this form of humiliation is just what they deserve or is only a small price for them to pay. In the Isle of Mann "birching" case discussed earlier, the state had similarly argued that the "judicial corporal punishment at issue in this case was not in breach of the Convention since it did not outrage public opinion."<sup>306</sup> The European Court rejected this view:

Even assuming that local public opinion can have an incidence on the interpretation of the concept of "degrading punishment" appearing in Article 3, the Court does not regard it as established that judicial corporal punishment is not considered degrading by those members of the Manx population who favour its retention: it might well be that one of the reasons why they view the penalty as an effective deterrent is precisely the element of degradation which it involves.<sup>307</sup>

## VI. HARM TO THE LEGAL PROCESS

I have focused on harms that bypass hearings impose on young women. But the legal system itself is compromised by virtue of the process. The hearings produce an engagement with law which challenges the integrity of the legal process in a number of ways, and I look here at several: the problem of ritualization and of sham, hearings as politicized shaming mechanisms and as the source of disillusionment with law, the "luck of the draw" problem, and the illegitimacy of denying minors a forum.

I turn first to the issue of ritual and sham and look at divorce hearings brought by unhappily married couples in the period before no-fault. These hearings, which led to the downfall of fault-based divorce, shed significant light on the bypass process and perhaps on its future. In

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<sup>305</sup> EHRlich, *supra* note 190, at 133.

<sup>306</sup> *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser A) ¶ 31 (1978).

<sup>307</sup> *Id.*



considering whether bypass hearings have aspects of sham hearings, I want to be clear that many bypass judges diligently attempt to discern whether a petitioner has adequately proved her maturity or best interests. Yet, many other bypass judges seem to fall into one of two categories: those who approve nearly all petitions and those who grant none at all. Judges who commonly grant petitions may be operating on something like a presumption that minors who are able to organize participation in a hearing have by that fact alone come close to demonstrating maturity. Those who grant none are generally opposed to abortion on religious grounds, or are opposed to granting a bypass petition on political ones. In either case, it might be argued there is little deep inquiry into the minor's maturity, although the appellate cases suggest this has been particularly so with regard to denials.

Several factors combine to bring about this result. One is the capaciousness of the standards for maturity and best interests that judges are to apply. But these standards are nothing new: in the area of child custody, for example, judges use them all the time. Why then should bypass cases prove so problematic? Part of the answer is the intrusion of politics into the hearing, where the contentious topic of abortion is posed center stage. At the same time, each individual bypass hearing is not intended as a private referendum on the question of abortion.

#### **A. Fault-Based Divorce: Hearings as Sham**

Before grounds for divorce were modified to include the all-encompassing "irreconcilable differences," a divorce petitioner had to plead and prove specific grounds of misconduct such as adultery, desertion, various degrees of cruelty, and habitual alcoholism.<sup>308</sup> Spouses who had not deserted one another or been cruel or adulterous (and had no desire to be) were in a pinch. If these couples wanted to divorce, they had to engage in a different sort of misconduct: collusion, the agreement to testify falsely that one or the other had engaged in one of the fault-based behaviors.<sup>309</sup> In states that required corroboration, parties brought in "correspondents," professional accomplices who were paid not to engage in actual wrong-

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<sup>308</sup> See generally HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988).

<sup>309</sup> See Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 33-34 (1966) (noting that common fabrications included "statements of domiciliary intent," "false allegations and testimony by one spouse as to non-existent cruel acts or vicious attacks," and "antisocial behavior ranging from perjury to mock or actual adultery").

doing but to testify that they had done so.<sup>310</sup> Lawrence Friedman explains that “this meant that the plaintiff not only had to lie herself, she had to bring in an auxiliary liar as well.”<sup>311</sup> Despite the fact that collusion was a bar to divorce, the practice was rampant.<sup>312</sup> Friedman notes that after 1870, most divorces were collusive: “there was no real courtroom dispute . . . [t]he ‘lawsuit’ was essentially a sham.”<sup>313</sup>

How did unhappy spouses become so sophisticated in figuring out how to bypass the strictures of fault-based divorce? The answer is that they were instructed by able matrimonial attorneys who tutored their clients not only on what to wear during staged indiscretions but on how to plead and testify in court.<sup>314</sup> Lawyers would lead the aggrieved spouse through a series of questions to which she would reply in monosyllables:

Q: [Mrs. X], during your marriage to Mr. X, has he on many occasions been cold and indifferent to you?

A: Yes.

Q: And as a result of this conduct on the part of your husband, have you become seriously ill, nervous, and upset?

A: Yes.<sup>315</sup>

The example was typical of “the melancholy and perfunctory litany of uncontested divorce, recited daily in courtrooms throughout the State.”<sup>316</sup>

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<sup>310</sup> For a wonderful account of how this worked in practice, see EVELYN WAUGH, *A HANDFUL OF DUST* (1999).

<sup>311</sup> Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1507 (2000).

<sup>312</sup> Roscoe Pound, Foreword, *The Law of Divorce*, 28 IOWA L. REV. 179, 184 (1943). The doctrine of collusion had “little force . . . in practice. Consider what any American community would think of a man convicted of extreme physical cruelty to his wife if those words (extreme cruelty) were taken seriously. But there are respected persons of high standing in every community against whom there are such records.” *Id.*

<sup>313</sup> Friedman, *supra* note 311, at 1504.

<sup>314</sup> *Id.* at 1512–13.

<sup>315</sup> GOVERNOR’S COMM’N ON THE FAMILY, 1966 REPORT OF THE CALIFORNIA GOVERNOR’S COMMISSION ON THE FAMILY (1966).

<sup>316</sup> *Id.*

In sum, divorce hearings consisted of perjury-filled testimony organized by the bar, performed by the litigants, and tolerated by the bench: “[t]he law was an ostrich; it was part of its formal strategy to bury its head in the sand.”<sup>317</sup>

In describing this process, the point is not that these unhappy couples should have been required to remain married. It was not the *result* of the hearings that was perverse, but rather the corruption of legal process to reach the result. Over time, the nature of the process provoked the radical reform of the underlying rule. That so many husbands and wives were willing to swear to invented affairs and cruelty finally persuaded everyone that the law should accommodate their marital preferences rather than suborn their testimony. According to the influential California Governor’s Commission on the Family, the introduction of no-fault divorce “will put an end to the dissimulation, hypocrisy—and even outright perjury—which is engendered by the present system.”<sup>318</sup> The notoriety of their own complicity brought the fault-based system down, as judges and attorneys became unable to participate in a charade of justice.<sup>319</sup>

Are bypass hearings also simply performances by pregnant teens who will say whatever it takes to get to yes? No, I am not suggesting that teenage petitioners, like divorce litigants of old, make things up in their hearings. They want an abortion and they can describe, if sometimes in teenspeak, the circumstances of their lives that led them to make this decision and to do so without formally involving a parent.

Nonetheless, something like the ritualistic recitations of the fault-based divorce hearings can sometimes be found in the bypass context. As one disgruntled Texas judge stated, “Doe’s evidence that she is mature and sufficiently well informed is very limited, consisting almost entirely of monosyllabic answers to conclusory questions posed by her counsel.”<sup>320</sup> In affirming the denial of bypass petition, a Florida court noted that:

In a similar vein showing failure to develop facts, i.e., sufficient evidence rather than conclusory statements, her counsel asked Ms. Doe if she had considered all the alternatives to terminating

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<sup>317</sup> Friedman, *supra* note 311, at 1507.

<sup>318</sup> GOVERNOR’S COMM’N ON THE FAMILY, *supra* note 315, at 267–70.

<sup>319</sup> Richard C. Dinkelspiel & Aidan R. Gough, *The Case for a Family Court—a Summary of the Report of the California Governor’s Commission on the Family*, 1 FAM. L.Q. 70, 70 (1967).

<sup>320</sup> *In re Jane Doe IV*, 19 S.W.3d 322, 324 (Tex. 2000).

her pregnancy. The monosyllabic answer was “yes.” When asked if she had given her decision to terminate the pregnancy long and thoughtful consideration, she answered “Mm hm.” When asked if this had been a difficult decision to arrive at, she answered again simply “yes.”<sup>321</sup>

It seems that judges fear they are being scammed by monosyllables. (A similar suspicion arose in the quasi-legal hospital review boards of the 1950s and 1960s; one board physician “spoke for many of his colleagues when he warned of the ‘clever, scheming women, simply trying to hoodwink the psychiatrist and the obstetrician’ when they asked permission to abort.”)<sup>322</sup> If a “yes” or an “mm hm” satisfies as evidence of maturity, do the hearings not have something in common with the stylized recitations of fault-based divorce? On the other hand, monosyllabic yes and no answers might be more manageable for young women on the stand than detailed judicial interrogations into their moral reasoning and birth control habits. It may also be reasonable in a hearing where the minor’s demeanor may count for everything, for her attorney to examine her in a more direct fashion. Certainly judges may intervene and ask questions (as many do) if they find the advocate’s questions or the petitioner’s answers lacking.<sup>323</sup>

Many judges do not intervene because they believe nothing more is necessary. Consider the earnest testimony of a Minnesota judge, one of a small cohort responsible for hearing most of the state’s bypass cases:

I know as a judge you would like to think your decisions are important, that you are providing some—you are doing some legitimate purpose. What I have come to believe . . . [is] that really the judicial function is merely a rubber stamp. The decision has already been made before they have gotten to my chambers. The young women I have seen have been very mature and capable of giving the required consent.<sup>324</sup>

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<sup>321</sup> *In re Doe*, 973 So. 2d 548, 557 (Fla. Ct. App. 2008).

<sup>322</sup> Solinger, *A Complete Disaster*, *supra* note 151, at 251.

<sup>323</sup> *Id.* at 553 (“It was the judge, not the minor’s attorney, who attempted to elicit testimony from the minor regarding why she did not want to have her parents notified and who pressed her for additional information when her answer was simply that she thought her parents would not understand.”).

<sup>324</sup> *Hodgson v. Minnesota*, 648 F. Supp. 756, 766 (D. Minn. 1986), *rev’d*, 853 F.2d 1452 (8th Cir. 1988).

Another Minnesota judge characterized his function as “a routine clerical function on my part, just like putting my seal and stamp on it.”<sup>325</sup> There is no thought here that the judiciary of Minnesota is lax. Rather, it appears that most judges accept that pregnant teenagers who have demonstrated the wherewithal to complete and file legal papers, meet with counsel, and come to court are mature enough to decide about an abortion. While taking charge of a predicament in this way may not be absolute proof of maturity, it would seem persuasive indeed.

## **B. HUAC and Shame**

This aspect of the bypass process—hearings where the important facts are known at the outset—is illuminated by another well-known example from the mid-twentieth century, the hearings held by the U.S. House Un-American Activities Committee (HUAC) in the early 1950s to investigate the supposed disloyalty of citizens suspected of having ties to the Communist Party. A prominent feature of these public, televised hearings was the testimony of subpoenaed witnesses asked to “name names” of colleagues or others known to them to have Communist ties. But as Victor Navasky has explained, the Committee already had the names: “the witnesses who named names publicly preceded their public testimony with private, executive-session rehearsals, which means that the public hearings were indeed largely ceremonial.”<sup>326</sup> What purpose did the hearings then serve? Navasky argues that they were simply “degradation ceremonies”; the public recitation was simply “the final proof that a witness had broken with his past.”<sup>327</sup>

The comparison with bypass hearings is not a happy one. While we can appreciate a difference between degradation and humiliation,<sup>328</sup> the difference may not signify much for the minor herself. The hearings are humiliating for participants, whether they are closely questioned by a judge or simply led through the basics by their own attorney. The testimony of

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<sup>325</sup> *Id.*

<sup>326</sup> VICTOR NAVASKY, NAMING NAMES 317 (1980).

<sup>327</sup> *Id.* at 318.

<sup>328</sup> For the difference between objective aspects of degradation and subjective aspects of humiliation, see Jeremy Waldron, Cruel, Inhuman, and Degrading Treatment: The Words Themselves 39–40 (Nov. 11, 2008) (unpublished manuscript, on file with NYU School of Law, Public Law & Legal Theory Working Paper Series), available at <http://ssrn.com/abstract=1278604>.

bypass petitioners is more private than that of witnesses called before HUAC, but it is still a compelled performance concerning the speaker's innermost commitments, here familial (do I want a child now?) rather than political.

And just as the HUAC hearings were staged to combat a subversive political threat to the American way of life, on some accounts legal abortion is similarly understood as a subversive threat to cherished values. For some, abortion undermines a way things once seemed to be, a world of obedient daughters and orderly families. For others, abortion itself is the threat. For still others—and the categories are not exclusive—the hearings represent an objectionable and on-going form of judicial activism that started with *Roe*.<sup>329</sup> As we have seen, each of these anxieties appears in reported bypass case law as well as in the unreported law produced and experienced, hearing by hearing. The law discredits itself by using pro forma hearings to put girls through the wringer when there is little factual doubt about the decisional maturity of a particular petitioner. Yet there is an additional reason why judicial bypass hearings serve the law badly. They produce not only dread before the experience and humiliation during, but disillusionment with justice after.

### C. Fairness and Legitimacy

As noted earlier, encounters with courts are where many people form their impressions of the American justice system.<sup>330</sup> Tom Tyler has explained that “if judges treat [people] fairly by listening to their arguments, by being neutral, and by stating good reasons for his or her decision, people will react positively to their experience,” whatever the substantive outcome.<sup>331</sup> In this way procedural fairness is understood to increase law's legitimacy.

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<sup>329</sup> Appellate judges in Alabama dispute which of them is the worst judicial activist, those who uphold trial court denials of bypass petitions or those who find some denials are erroneous:

“Contrary to the dissenting opinions, it is the courts' expansion of the right of privacy that has been perhaps the most prominent example of judicial activism in this country's history.”

*Ex parte* Anonymous, 803 So. 2d 542, 550 (Ala. 2001) (arguing over weight to be given undisputed testimony on appeal). *See also In re Jane Doe IV*, 19 S.W.3d 337 (Tex. 2000).

<sup>330</sup> *See* FEELEY, *supra* note 34, and accompanying text.

<sup>331</sup> TOM TYLER, *WHY PEOPLE OBEY THE LAW* 117 (2006).

Do bypass hearings meet these basic criteria of neutrality and fairness? Certainly not in every instance. We have seen petitions denied for reasons that defy the logic of the process, as when the minor's pregnancy itself is declared the ground for immaturity.

The disillusioning practices of unfairness take other forms as well, as when judges apply the law in ways that disregard any plausible principle of charity inherent in the concept of fairness. Consider a 2008 Florida bypass case in which a seventeen-year-old high school senior was asked about her plans after graduation.<sup>332</sup> She replied that she was "going to go to H.C.C. [Hillsborough Community College] for two years and then . . . transferring to U.S.F. [University of South Florida] for maybe a pharmaceutical degree or a pediatrician."<sup>333</sup> Her petition was denied on the grounds of immaturity, and much hinged on the meaning of the word "plan." In affirming the denial, the judge explained that:

Ms. Doe's testimony is indicative of an educational *aspiration* or ultimate career *goal*. It is not, however, indicative of a plan . . . . For example, as a senior in high school, and midway through the academic year, evidence that she had in fact submitted an application for admission to the educational institution she identified would suggest a true plan. Generally, admission requires an appropriate test score from a recognized testing organization. The taking of such a test is substantial factual evidence of a plan. Proof of acceptance, in my view, would provide further factual support, although being denied acceptance does not indicate lack of a plan or lack of maturity. Alternatively, testimony that Ms. Doe is presently embarking on her plan and has identified the requirements for admission would also have been of evidentiary value. . . . I do not imply that she has not done these things, only that she failed to present to the trial judge sufficient, detailed evidence of mature behavior in furthering any plan for her education . . . .<sup>334</sup>

What are we to make of this speech? Certainly it provides guidance for Florida attorneys advising subsequent bypass petitioners about preparing a more detailed evidentiary record in the short and intense moments of consultation they have with their clients. But it also shows that if a judge

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<sup>332</sup> *In re Doe*, 973 So. 2d 548, 557 (Fla. Ct. App. 2008).

<sup>333</sup> *Id.* at 557.

<sup>334</sup> *Id.* (emphasis added).

wants to find a girl immature, there is almost always room to do so. I do not know the application deadlines for Hillsborough Community College, and I suspect neither did the judge. Maybe the Florida Jane Doe will never end up as a pediatrician or pharmacist. But she has grasped the relationship between her educational aspirations and motherhood; she does understand how one progresses from local to regional schools. One suspects that even she understood that her failure to provide her SAT scores is not why her petition was denied.

On occasion, the relation between the integrity of the justice system and truly egregious judicial conduct regarding the bypass process is recognized and addressed. In 1992, trial judge Francis Bourisseau gave a news interview in which he stated that he might grant a bypass petition in the case of a white girl raped by a black man.<sup>335</sup> In affirming his censure, the Michigan Supreme Court held that these remarks were “clearly prejudicial to the administration of justice”; the judge’s conduct “called into question the impartiality of the judiciary, and exposed the judicial system to contempt and ridicule.”<sup>336</sup> But it is worth looking at Judge Bourisseau’s remarks and the court’s objections to them more closely. In the full interview, the judge had stated that he didn’t want to have “blood on his hands” for participating in permitting abortions *at all*;<sup>337</sup> the racialized rape example was simply an exception to his general policy of denying all bypass petitions. *That* judicial conduct—ordinary day to day denials because the judge thinks abortion is murder—is not generally regarded as subjecting the system to contempt, though it cannot be fairly regarded otherwise.

#### D. The Dignitarian Luck of the Draw

Not all judges who oppose abortion, or who for reasons of electoral politics refuse to be associated with authorizing an abortion, call into question the impartiality of the judiciary. The outcome of a petition may

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<sup>335</sup> *In re Bourisseau*, 480 N.W.2d 270 (Mich. 1992). The Bourisseau case is now used as an example of “bias towards litigants” in chapter nine of the JUDICIAL EDUC. CTR. OF N.M., JUDICIAL ETHICS HANDBOOK (2004), available at [http://jec.unm.edu/resources/judicial\\_handbook/ethics/index.htm](http://jec.unm.edu/resources/judicial_handbook/ethics/index.htm).

<sup>336</sup> *Bourisseau*, 480 N.W.2d at 270.

<sup>337</sup> Jeff Holyfield, *Michigan’s Highest Court Censures Judge for Racial Rape Remark*, ASSOCIATED PRESS, Mar. 3, 1992; see also *Judge Apologizes for Racial Remarks on Youth Abortion*, BALTIMORE SUN, May 3, 1991.



depend entirely on who hears the case. Consider the heartfelt statement of an Ohio judge:

It's really tough. I'm as Roman Catholic as you can get and I follow the church's teachings. But where these cases come before the court, I must follow the law. Whether I agree with (a girl's) decision is another matter.<sup>338</sup>

But there is something terribly wrong with a legal procedure that can be aptly captured by the headline of an investigative story in the local paper, "*Abortion Waivers are a Judicial Crapshoot*."<sup>339</sup> I recognize that to some extent, luck is always a feature of the administration of justice.<sup>340</sup> Nonetheless, there should be limits on the system's tolerance for luck, especially when luck determines not only the outcome, but finding a forum in the first place and how forum finders are treated throughout the process.

This aspect of the process—the luck of the draw aspect—relates directly to the concept of dignity. In analyzing what is wrong with shaming sanctions—such as publishing the names, pictures, and crimes of convicted offenders—James Q. Whitman has observed that objections to shaming often rest on the liberal argument that there are limits on how the state may punish: depriving a person of liberty or property is acceptable; depriving them of dignity is not.<sup>341</sup> Toni Massaro explains that shaming mechanisms “authorize public officials to search for and destroy or damage an offender's dignity . . . [which is] an Orwellian prospect.”<sup>342</sup> But there is another way in which shaming implicates dignity. Whitman argues that shaming is a “peculiarly disturbing species of lynch justice”; it works

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<sup>338</sup> Phil Trexler, *Abortion Fiery Issue for Judges*, AKRON BEACON J., Nov. 9, 2003, at A1 (quoting Franklin County Juvenile Court Judge Lias). See also Larry Cunningham, *Can a Catholic Lawyer Represent a Minor Seeking a Judicial Bypass for an Abortion?*, 44 CATH. LAW. 379 (2006). For a discussion of whether granting a bypass petition is, from a pro-life perspective, cooperating in evil, see Eric Parker Babbas, *Pro-Life Judges and Judicial Bypass Cases*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y. 473, 489–97 (2008) (arguing that pro-life judges should either recuse themselves from the case or resign).

<sup>339</sup> Candisky & Edwards, *Abortion Waivers*, *supra* note 85, at 1A.

<sup>340</sup> See Jeremy Waldron, “*Lucky in your Judge*,” 9 THEORETICAL INQUIRIES L. 185 (2008), available at <http://www.bepress.com/til/default/vol9/iss1/art7>.

<sup>341</sup> James Q. Whitman, *What is Wrong with Inflicting Shaming Sanctions?*, 107 YALE L.J. 1055, 1059 (1998).

<sup>342</sup> Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1943 (1990).

because of “an ugly complicity” between the state and the crowd. Because a shamed offender does not know just how far the public will go with the information, or just what they will do, shaming acts as a kind of “posse-raising legal politics.”<sup>343</sup> This violates what Whitman identifies as “transactional dignity:

a deeply rooted norm of our society that persons should never be forced to deal with wild or unpredictable partners. . . . It is the dignity involved in having the right to know what kind of deal one has struck, and on what terms.<sup>344</sup>

This conception of dignity illuminates the bypass process with regard to the predictability of encounters between legal subjects and the state. Serendipity is not supposed to be embedded in, nor tolerated by, the processes by which people exercise their rights. The deal minors have struck, or have been handed, is to participate in a hearing before a judge. They are not assured that every petition will be granted, but they *are* entitled to have their petitions accepted and their evidence evaluated fairly. This is the core of the “transaction” that we consider legal process to be. Unpredictability occasioned by moral or political disagreement on the part of a judge shakes this deeply rooted norm, the more so since it is not the crowd but the court itself whom petitioners have reason to fear.

I am not suggesting that bypass judges act like vigilantes exactly, treating bypass petitioners as many communities treat child molesters, trying to run them out of town by offering them no quarter.<sup>345</sup> Nonetheless, some judges *have* closed their courthouses to would-be petitioners, and others have made it possible to identify petitioners who are then subject to whatever informal sanctions come their way. Philosopher Jeffrie Murphy has characterized shaming punishments as “coercive exercise[s] in humiliation and degradation—a kind of smug and mean-spirited vengeance with tendencies to lap into arbitrary cruelty.”<sup>346</sup> We have already seen examples of mean-spiritedness in the bypass context, but we should not lose sight of the arbitrariness of it all.

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<sup>343</sup> Whitman, *supra* note 341, at 1088.

<sup>344</sup> *Id.* at 1090.

<sup>345</sup> See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR 42 (2007).

<sup>346</sup> Jeffrie G. Murphy, *Shame Creeps through Guilt and Feels like Retribution*, 18 LAW & PHIL 327, 338 (1999).

### E. The Illegitimacy of Forum Exclusion

Finally, I want to consider the problem of forum exclusion not only as unacceptably burdening minors, but as unacceptably discrediting the legal system itself. The U.S. Supreme Court considered this problem in a somewhat different context in the early 1970s. At that time the state of Connecticut charged couples seeking a divorce sixty dollars in fees and costs.<sup>347</sup> Representing a class of indigent women seeking to divorce, plaintiff Gladys Boddie argued that because she couldn't afford the sixty dollars, she was denied access to the court and thus to due process itself, even in a civil matter.<sup>348</sup> Deciding for Boddie, the Court made two foundational observations. The first was that Connecticut had created a monopoly over the dissolution of marriage: spouses who sought to divorce could do so only through the judicial process.<sup>349</sup> Second, the Court acknowledged the state's long-standing interest in the institution of marriage.<sup>350</sup> The two combined to create a circumstance in which a judicial hearing was "the exclusive precondition to the adjustment of a fundamental human relationship."<sup>351</sup>

In holding that "due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard,"<sup>352</sup> the Court recognized that all earlier cases concerning access to court involved criminal defendants, not civil plaintiffs. Nonetheless, it characterized Boddie's "plight . . . [as] akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes."<sup>353</sup> Her "resort to the judicial process . . . is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court. For both groups this

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<sup>347</sup> Boddie v. Connecticut, 401 U.S. 371, 372 (1971).

<sup>348</sup> *Id.*

<sup>349</sup> *Id.* at 374.

<sup>350</sup> *Id.* at 376.

<sup>351</sup> *Id.* at 383.

<sup>352</sup> *Id.* at 377.

<sup>353</sup> *Id.* at 376.

process is not only the paramount dispute-settlement technique, but, in fact, the only available one.<sup>354</sup>

The plight of a bypass petitioner denied access to a bypass hearing is similarly akin to that of Mrs. Boddie (and, by implication, to the criminal defendant as well). Certainly there are differences: bypass exclusions result not from rules of court but from a judge's personal preference, and, unlike divorce litigants locked in by residency requirements, bypass petitioners *may* be able to travel and obtain either a hearing or an abortion in another state. But there are crucial similarities. Abortion is a matter in which the state has a great interest, and, like divorce, it too involves "the adjustment of a fundamental human relationship."<sup>355</sup> Moreover, the state has created a monopoly for itself over the resolution of a minor's abortion decision. Indeed, Martin Guggenheim has argued that the bypass arrangement gives judges not just a monopoly but an impermissible veto over the young woman's decision.<sup>356</sup>

To be clear, my argument here is not about the denial of due process to minors (although others may be interested in the project).<sup>357</sup> My concern is the harm inflicted by the bypass process on the legal system itself. A similar concern was recognized in *Boddie*. As the Court made clear, at the point where a "judicial proceeding becomes the only effective means of resolving the dispute at hand," the "denial of a defendant's full access to that process raises grave problems for its legitimacy."<sup>358</sup> One way of expressing the gravity of the problem is as a constitutional violation. But the values that underlie the Fourteenth Amendment—the premises "that this Court has through years of adjudication [used to] put flesh upon the due process principle"<sup>359</sup>—register even outside the formal constitutional framework. Although bypass hearings are not about dispute settlement (or are not supposed to be) the Court's concerns in *Boddie* apply:

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<sup>354</sup> *Id.* at 377.

<sup>355</sup> *Id.* at 383.

<sup>356</sup> Martin Guggenheim, *Minor Rights: The Adolescent Abortion Cases*, 30 HOFSTRA L. REV. 589, 646 (2002).

<sup>357</sup> A *substantive* due process argument based on the haphazard nature of judges' bypass decisions (but not their denial of forum) was rejected in *Cleveland Surgi-Center, Inc. v. Jones*, 2 F.3d 686, 690–91 (6th Cir. 1993), *cert denied*, 510 U.S. 1046 (1994).

<sup>358</sup> *Boddie*, 401 U.S. at 376.

<sup>359</sup> *Id.* at 375.

American society bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement . . . Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just.<sup>360</sup>

## VII. ABORTION POLITICS AND BYPASS PROCESSES

The politics of abortion is apparent in both the structure and the judicial implementation of the bypass process. Certain interventions have been procedural. These include judges appointing counsel for the fetus,<sup>361</sup> establishing a higher than usual burden of proof by taking an imagined parental perspective into account,<sup>362</sup> and denying petitions on extra-statutory grounds, such as requiring the minor to be “extraordinarily mature.”<sup>363</sup> Judicial opposition to abortion has also colored how the hearings are conducted. Judges have questioned petitioners as though abortion’s legality was unresolved, as though the only measure of a petitioner’s maturity was the decision not to abort and the hearing offered a chance to remonstrate against it. They have asked petitioning minors whether they understand that abortion is murder, whether they would kill their own three-year-old child, whether they change their mind about abortion if they knew their baby would go to a loving adoptive family or if they were given \$2000.<sup>364</sup> Bypass denials have been sprinkled with pro-life

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<sup>360</sup> *Id.*

<sup>361</sup> See generally *Ex parte* Anonymous, 810 So.2d 786, 789 (Ala. 2001); Silverstein, *Anonymous*, *supra* note 90.

<sup>362</sup> See text accompanying footnote 93.

<sup>363</sup> See *In re Doe*, 866 P.2d 1069, 1074 (Kan. 1994) (referring to the trial court’s decision, which the Kansas Supreme Court reversed). Judges have also denied petitions on the ground that, despite medical evidence to the contrary, the minor’s pregnancy was too developed. See *In re L.D.F.*, 820 A.2d 714 (Pa. 2003) (overturning denial based on grounds of trial court’s opinion about petitioner’s “late status” pregnancy). In that case, the superior Court held that “[t]he [bypass] Act’s clear provision that informed consent abortions are lawful in pregnancies of less than 24 weeks must control.” *Id.* at 717. See also *In re T.H.*, 484 N.E.2d 568 (Ind. 1985) (upholding trial court’s denial of petition on ground that the fetus might be viable, despite medical testimony stating it was not viable).

<sup>364</sup> NAT’L P’SHIP REPORT, *supra* note 59, at 17 (account of several advocates).

sentiment: “This is a capital case. It involves the question whether [the minor’s] unborn child should live or die.”<sup>365</sup> And some judges refuse to hear bypass cases at all.

Judicial opposition to abortion may stem from a judge’s religious beliefs or from concerns about election, or both. Some 87% of all state and local judges now run for election in some form or other,<sup>366</sup> and a study of judicial elections over a twenty-five-year period shows that abortion has become a prominent issue in judicial campaigns.<sup>367</sup> Judicial candidates have advertised themselves as being pro-life during an election,<sup>368</sup> and have publicly celebrated the fact thereafter.<sup>369</sup>

In this last section, I want to make three points about the relation between judicial elections and the fair administration of justice in the bypass setting. The first is simply that the two issues cannot be isolated from one another. To avoid being associated with abortion at all, judges have fought to keep their names off reported bypass decisions, unsuccessfully in Ohio<sup>370</sup> and successfully in Texas.<sup>371</sup> From a political

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<sup>365</sup> *In re Anonymous*, 905 So. 2d 845, 850 (Ala. Civ. App. 2005). The minor had also testified that she worked part-time at two restaurants during the preceding year-and-a-half; that the father of the child no longer speaks to her and has no interest in raising the child; and that, while she did not want to tell her parents about the abortion at the time of the hearing, she planned to tell them in the future when she felt comfortable.

<sup>366</sup> See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 181 (2004). These include both initial elections and retention votes after appointment.

<sup>367</sup> See Brandice Canes-Wrone & Tom S. Clark, *Judicial Independence and Nonpartisan Elections*, 2009 WIS. L. REV. 21, 31–33 (2009) (presenting evidence that nonpartisan electoral systems affect judicial decisions to a greater degree than partisan electoral systems as voters draw no inferences from party affiliation and press candidates for their views on particular issues, such as abortion).

<sup>368</sup> *Deters v. Judicial Ret. and Removal Comm’n*, 873 S.W.2d 200, 203 (Ky. 1994).

<sup>369</sup> See, e.g., *In re Disciplinary Proceeding Against Richard B. Sanders*, 955 P.2d 369, 377 (Wash. 1998). In that case, immediately after being sworn in as a newly elected justice of the Washington State Supreme Court, Justice Richard Sanders left his own inauguration ceremony to join a March for Life rally on the steps of the state legislature. At the rally Sanders wished the crowd well “in this celebration of human life,” stating that “I owe my election to many of the people who are here today.” *Id.* at 371. A subsequent reprimand by the Judicial Conduct Commission was reversed on the ground that there had not been clear and convincing grounds that Sander’s speech had threatened or compromised the integrity or impartiality of the judiciary. See *id.* at 377.

<sup>370</sup> *State ex rel. The Cincinnati Post v. Second Dist. Ct. of Appeals*, 604 N.E.2d 153 (Ohio 1992).

point of view, this may make sense. The official 2006 platform of the Texas Republican Party called for the “electoral defeat of all judges who through raw judicial activism seek to nullify the Parental Consent Law by wantonly granting bypasses to minor girls seeking abortion.”<sup>372</sup>

A Kentucky case further illustrates the relationship between elections and the bypass process. In 1991, Jed Deters, a candidate for a district court judgeship in Northern Kentucky, ran political ads in two local newspapers stating “Jed Deters is a Pro-Life Candidate.”<sup>373</sup> Deters lost the election but was censured by the Kentucky Judicial Retirement and Removal Commission for violating the Code of Judicial Conduct canon prohibiting “statements that commit or appear to commit” a candidate with respect to cases, controversies, or issues likely to come before the court.<sup>374</sup> In upholding Deters’ censure on appeal, the Kentucky Supreme Court expressed “no doubt” that Deters had intended to commit himself on pro-life issues; as he “freely testified that ‘any good Catholic is pro-life,’ that Kenyon County has a high percentage of Catholic voters, and that his statement . . . would ‘hopefully’ give him a ‘distinct edge in the race,’ since ‘you’re in it to win. You do what it takes.’”<sup>375</sup>

Deters argued that he had not violated the canon, not because he hadn’t committed on the issue, but because no abortion issue was likely to come before the court and so the canon didn’t apply. He explained that the only two hospitals in the county were Catholic and didn’t provide abortions, that there were no abortion clinics, and that not one “abortion-related case” had come before the court in ten years.<sup>376</sup> The court rejected the argument,

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<sup>371</sup> Donald, *supra* note 167. Bypass politics go all the way up. Texas Supreme Court Justice Deborah Hankinson was passed over for appointment to the Fifth Circuit by President George W. Bush in favor of Justice Priscilla Owens because of their comparative positions interpreting Texas’s bypass statute. As attorney Susan Hays observed, “[t]hese are members of the Texas Supreme Court. Can you imagine what disclosure would do to a small-town, conservative judge?” *Id.*

<sup>372</sup> Republican Party of Tex., 2006 State Republican Party Platform 15 (June 1, 2006), <http://www.texasgop.org>.

<sup>373</sup> *Deters*, 873 S.W.2d at 201.

<sup>374</sup> *Id.* at 202.

<sup>375</sup> *Id.* at 203.

<sup>376</sup> *Id.*

reminding Deters that under state law, a *judicial bypass petition* might indeed come before the court.<sup>377</sup>

Of course, Deters probably described the docket in Kenyon County accurately. As he pointed out, Cincinnati is only fifteen minutes away (if in another state), and local girls may well make the trip if they want to file a bypass petition.<sup>378</sup> But while Deters may have had his numbers right, I think he had the causation wrong. The absence of abortion cases does not determine the permissible scope of campaign speech. Pregnant minors who know where local judges stand are more likely to try their bypass luck elsewhere.

This leads to the second discouraging point about abortion politics and the bypass process. Where judges stand on abortion, as on other substantive issues, is likely to become increasingly well-known. In 2002, in *Republican Party of Minnesota v. White*, the United States Supreme Court invalidated a Minnesota Code of Judicial Conduct provision prohibiting judicial candidates from “announcing” their views on disputed legal and political issues.<sup>379</sup> The Court held, in a 5-4 decision, that the prohibition violated the First Amendment rights of judicial candidates.<sup>380</sup> It is unclear if *White*, which dealt with an “announce” clause necessarily invalidates “commit clauses,” of the kind at issue in the *Deters* case.<sup>381</sup> Yet it seems quite clear that judicial candidates after *White* are freer to express their views—if not their commitment regarding future cases—on the matter of abortion.

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<sup>377</sup> *Id.* (noting that other non-bypass claims involving his pro-life views might come before the court, including “misdemeanor cases . . . involving abortion protests, including trespass, disorderly conduct, or assault,” and non-abortion issues such as “living wills and . . . removing tubes or respirators”).

<sup>378</sup> *Id.*

<sup>379</sup> *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002). The candidate in *White*, Gregory Wersal, was running for associate justice of the Minnesota Supreme Court and had distributed literature criticizing several of that court’s decisions on such issues as crime, welfare, and abortion. *Id.* With specific regard to abortion, Wersal had criticized a decision holding that the Minnesota Legislature’s refusal to provide welfare medical benefits for abortions violated a woman’s right to an abortion. Brief of Petitioners-Appellant Wersal et al. at 6, *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (No. 01-521), 2002 WL 424442.

<sup>380</sup> *White*, 536 U.S. at 766.

<sup>381</sup> See Briffault, *supra* note 366, at 202–209.



This is clear from a new study by political scientists challenging the conventional wisdom regarding judicial independence and structure of judicial elections, which uses decisions on abortion-related cases as its data. The thought has long been that nonpartisan elections, where judges' party affiliations are not on the ballot or on their campaign literature, increases judicial independence because candidates are freed from the constraints of party platforms and from immediate association with candidates for other elected offices.<sup>382</sup> But the study suggests that *nonpartisan* elections, in which voters have little to work with but claims of character, encourage judges to be more responsive to public opinion as single-issue interest groups and aggressive media push unaffiliated candidates to articulate their views with particularity. Judicial candidates in nonpartisan elections have been questioned by state Right to Life Committees (asking if they "believe *Roe v. Wade* was wrongly decided");<sup>383</sup> television ads criticized an incumbent by claiming "[in Judge] Janet Stumbo's opinion . . . there's no criminal liability for killing an unborn child."<sup>384</sup> Certainly the holding in *White* and the "nastier, noisier, and costlier" manner of judicial campaigns<sup>385</sup> raise deep concerns about the "'disinterestedness' of the judiciary"<sup>386</sup> and about the relation between a politicized bench and the rule of law.<sup>387</sup>

Yet the proper balance between free speech concerns and judicial impartiality is not the focus of this paper. Accepting *White* as good law, my interest is on its impact on the operation of the bypass process. After all, *Roe* and *Casey* are still good law too. The question I have put on the table is

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<sup>382</sup> Canes-Wrone & Clark, *supra* note 367, at 34.

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* See generally Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669 (2002) (study of television ads in four state supreme court elections).

<sup>385</sup> See Roy A. Schotland, *Judicial Independence and Accountability*, 61 LAW & CONTEMP. PROBS. 149, 150 (1998).

<sup>386</sup> Republican Party of Minn. v. White, 536 U.S. 765, 802 (2002) (Stevens, J., dissenting) ("The Court seems to have forgotten its prior evaluation of the importance of maintaining public confidence in the 'disinterestedness' of the judiciary."); *id.* at 818 (Ginsburg, J., dissenting) ("Prohibiting a judicial candidate from pledging or promising certain results if elected directly promotes the State's interest in preserving public faith in the bench.").

<sup>387</sup> See also Paul J. De Muniz, *Politicizing State Judicial Elections: A Threat to Judicial Independence*, 38 WILLAMETTE L. REV. 367, 387 (2002) ("Dedication to the rule of law requires judges to rise above the political moment in making judicial decisions.").

whether in the face of all this good law, judicial hearings are appropriate or fair to decide about a minor's maturity or whether they are a piercing misuse of law. In asking the question, I am not challenging the free speech rights of judicial candidates. I am suggesting that the demonstrated and growing exercise of judicial speech with regard to abortion provides another potent reason why bypass hearings should be abandoned as the means of supervising teenage abortion decisions.

### VIII. CONCLUSION

The two objections to the bypass process I have set out—harm to girls and harm to the legal system—add up to a third injustice at a societal level. A legal system that requires young pregnant women to participate in hearings whose main function is to harass and to punish is not the kind of system one should expect in a just or decent society. Avishai Margalit has identified a decent society as one whose institutions do not cause people to feel humiliated.<sup>388</sup> Judicial bypass hearings humiliate. They require detailed disclosures from vulnerable young women on the most intimate of subjects and often for reasons that have little to do with the state's interest in their welfare. This is a considerable and an unjustified intrusion on privacy, which is for Margalit “in itself a paradigmatic act of humiliation.”<sup>389</sup>

It is particularly distressing that *legal process* is being used in this pursuit. Courthouses, or certainly the old ones, were sites of civic pride: they were grand because grand things were decided; law itself was in operation. The treatment of minors is the more troubling because there is no need to use judicial hearings as the means by which teenage abortion decisions are supervised. Nothing about a judicial hearing is constitutionally compelled. *Bellotti* focused on hearings because that was the procedure before the Court, but as the Court made clear, “much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction.”<sup>390</sup>

Several states have enacted just such measures. Maine, for example, authorizes minors either to get the consent of a parent *or another adult family member* or to receive counseling from designated counselors, including clergy, nurses, or psychologists. These counselors must provide the minor not only with information about abortion but also about adoption,

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<sup>388</sup> AVISHAI MARGALIT, *THE DECENT SOCIETY* 1 (1996).

<sup>389</sup> *Id.* at ch. 12.

<sup>390</sup> *Bellotti v. Baird*, 443 U.S. 622, 643 n.22 (1979).

pregnancy, and state benefits for child-rearing.<sup>391</sup> Delaware has also widened the scope of those to whom a minor might turn: notice can be given to a grandparent or a licensed mental health professional instead of parent or legal guardian. As in Maine, the person is required to explain that “the options available to [the minor] include adoption, abortion, and full-term pregnancy” and must also agree that it is in the minor’s best interests to waive parental consent.<sup>392</sup>

These more capacious mechanisms for adult involvement in a minor’s abortion decision make great sense. Teenagers are commonly connected to a broader network of communities than their immediate families and the law should take advantage of those connections.<sup>393</sup> If there is legislative concern about minors proceeding without adult participation (other than the physician), offering minors an array of trusted sources may well produce a more individualized, more sustained, and more substantive intervention than the haphazard and often reluctant participation by a judge. After all, the judge has no stake in the particular minor, does no follow-up, and is unlikely ever to see her again. In contrast, those she trusts are likely to be available at all stages of her decision-making process and after, and to treat her fairly along the way.

Each year over one million women in the United States decide, usually for a combination of reasons—their finances, their aspirations for the future, the absence of their partner, their obligations to existing children, and their health or that of the fetus—not to continue a pregnancy.<sup>394</sup> Put

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<sup>391</sup> ME. REV. STAT. ANN. tit. 22, § 1597-a (1992).

<sup>392</sup> Parental Notice of Abortion Act, DEL CODE ANN. tit. 24, § 1783(a) (2009). The model of non-judicial consultation has proved workable in Germany, where all pregnant women must attend counseling sessions as a prerequisite to consenting to an abortion. The counseling, offered by both private and public agencies (including religious organizations), must inform women that “the unborn life has its own right to life.” LEE ANN BANASZAK ET AL., *WOMEN’S MOVEMENTS FACING THE RECONFIGURED STATE* 152 (2003). See also Nanette Funk, *Abortion Counseling and the 1995 German Abortion Law*, 12 CONN. J. INT’L L. 33 (1996). In 1999, the Pope ordered the German bishops to withdraw Catholic agencies from such counseling, declaring, “In the defense of life, it is essential that bishops of the entire church speak unanimously and with one voice.” Alessandra Stanley, *Pope Lectures German Bishops On Abortion*, N.Y. TIMES, Nov. 21, 1999, at A9. In response to the prohibition, Catholic laypeople then formed a private counseling organization, Donum Vitae. *Id.*

<sup>393</sup> See Martha Minow, *Rights For the Next Generation: A Feminist Approach to Children’s Rights*, 9 HARV. WOMEN’S L.J. 1, 6 (1986). For an excellent account of how teens stand by one another in thinking through, arranging, and accompanying a friend to the doctor, see HERSCH, *supra* note 115, at 194–205.

<sup>394</sup> GUTTMACHER INST., *FACTS ON INDUCED ABORTION IN THE UNITED STATES* 1–2 (2008), available at [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.pdf](http://www.guttmacher.org/pubs/fb_induced_abortion.pdf).

another way, forty percent of all American women will have had an abortion before their reproductive years are over.<sup>395</sup> These numbers suggest that most of us are likely to know someone who has had or will have an abortion. They are our students and colleagues, our wives, daughters, and neighbors. Surely some of them are not the kind of person we think should be humiliated by legal process. Indeed, I am never sure which women people think should be humiliated by law, but teenagers seem to be high on many people's lists.<sup>396</sup>

Here I return to the concept of decisional dignity. If a woman has the right to decide whether or not to terminate an unwanted pregnancy, her decision should not be taxed with a hidden surcharge of punishment by process. *Of course* we want young women to make informed decisions and to be able to talk over a decision as serious as one about whether to become a mother with those who care about them and in whom they trust. But judicial bypass hearings have little to do with improving the quality of a minor's abortion decision, and much to do with punishing her if she proceeds.

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<sup>395</sup> *Id.* at 1–2.

<sup>396</sup> See Francine T. Sherman, *Thoughts on a Contextual View of Juvenile Justice Reform Drawn from Narratives of Youth*, 68 TEMP. L. REV. 1837 (1995) (describing how fear of teenagers seems to be a factor in waiving juvenile defendants into the criminal justice system from juvenile court).