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Introductory Remarks: The Burden of Judicial Bypass Proceedings

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INTRODUCTORY REMARKS:

THE BURDEN OF JUDICIAL BYPASS PROCEEDINGS

ANN SHALLECK^{*}

A young woman, a girl of sixteen, discovers she is pregnant. She knows that she wants to have an abortion. She may want to continue with her education. She might know that she is not ready to take on the enormous responsibility of raising a child. She might be playing an important role in supporting emotionally, or even financially, the family into which she would bring a child. To add her own child to that family constellation might seem overwhelming. She might not want to have a life-long connection to the boy or young man who got her pregnant. That relationship could be unsatisfactory or even destructive. She might not want that person to be a father of her child. She might want to raise a child with someone she loves. She might be ashamed of or embarrassed about her sexual activity. She might blame herself for the pregnancy. She might not want her parents to know about the crisis she faces. She might not want to

^{*} Professor of Law, American University, Washington College of Law. A.B. 1971, *Bryn Mawr College*; J.D. 1978, *Harvard Law School*. The materials in this symposium were created as part of an integrated section for our first year students at the Washington College of Law. Professor Andrew Popper conceptualized and coordinates the work of this section. Without his leadership, vision, care and support, this symposium would not have been possible. He has insured that innovative projects are a fundamental part of the work of the section. I would also like to thank Maria Mirabell, Amber Asher, Brian Appel, and Lance Rothenberg, who worked on assembling the materials and performing the roles in the class dramatizations. brought enthusiasm, intelligence and hard work to the project, all of which made the program fun, as well as rewarding.

burden them. She might be afraid of one or both of them. I have only begun to chronicle the reasons behind the young woman's feeling that she wants an abortion. Abortion counselors around the country know these reasons and many more.

The set of materials in this issue of the *Journal of Gender, Social Policy, and the Law* seeks to translate the legal doctrines regarding parental notification and/or consent, judicial bypass, and undue burden into a form that gives those abstract doctrinal formulations meaning within the lives of the real people whose lives are affected by the pronouncements of the Supreme Court. The two-part dramatization of Maggie's efforts to obtain an abortion is designed to provide law students, law professors, lawyers, judges, advocates, and all people who work with young women a better understanding of how Supreme Court law operates the arena of abortion access.

We have provided a transcript of how an interview and counseling session might unfold between a young woman, Maggie, who is seeking an abortion in a fictional state, and a lawyer, who has decided to devote some of his time to providing legal help in this situation. The interview was constructed from the many materials that have been amassed by organizations that work with these young women on a daily basis. It is not meant to be a "typical" interview. The situation of each young woman is different. The challenges each woman faces vary. The procedures in each county and in each state have their own individual quirks. Each young woman's attitudes toward family, friends, lovers, sexual partners, school, the future, work, children, committed relationships, abortion, and multiple other factors affect differently her approach to the decision about ending a pregnancy. Each young woman brings unique capacities for dealing with the dilemmas, conflicts, feelings, expectations, logistical barriers, and attitudes that she encounters.

We have also provided a transcript of a fictionalized judicial bypass hearing. These hearings are a critical component of Supreme Court law regarding the burdens of parental notification. These hearings provide the legal rationale for upholding as constitutional a state statutory requirement of parental notification or consent. Since parental notification or consent might be potentially harmful to or impossible for a minor, a process is needed that enables a young woman to exercise her constitutional right. Judicial bypass is the process that saves parental notification and consent requirements from constitutional defect. These judicial bypass proceedings are confidential, so we have no actual transcripts on which to base the dialogue. Rather, we relied on the accounts of those who have attended these hearings and our understanding of how typical

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standards that govern these proceedings might be interpreted and applied by a judge.

We have created just one situation; it is not meant to be a story of extreme hardship. Maggie, however, faces real and compelling problems. She has resources and support, although limited, to deal with those problems. She has the strength and capacity to follow from one step to another in the constitutionally-mandated judicial bypass process. By portraying this individual in this situation, we hope not just to convey the dynamics of this particular set of circumstances, but to suggest the wide range of circumstances in which the constitutional doctrines operate with varying effects. Similarly, the hearing is not designed to portray an ideologically polarized proceeding. The judge is not meant to be openly anti-abortion or pro-abortion. The judge may bring many assumptions and feelings that influence his approach to the hearing: underlying attitudes toward abortion, child rearing, family, sexuality (including the sexual behavior of young women and men), the behavior of teenagers, parental responsibility for minors, gender, women's education, participation in the working world, the financial responsibility of mothers and fathers for the expenses of raising a child, and many others. The judge appears to try to make sense of and take seriously the legal standards that guide the proceeding. By portraying the judge as taking this approach, we have attempted not just to convey this particular situation, but also to suggest the ways things might be different given the wide range of dynamics that might occur in a courtroom where the constitutionally required procedure assumes human form.

The commentaries that follow the two-part dramatization address some of the legal background for and raise some of the broader issues that are suggested by the interview and the hearing. Professor Jamin Raskin, the author of the judicial bypass script and actor portraying the judge when we presented the program at the American University, Washington College of Law, provides insight about what the legal standards governing judicial bypass actually mean as a judge struggles to apply them.² He highlights the seemingly inevitable contradictions that those standards produce, absent an ideologically driven judge. How can a minor who is not sufficiently mature to make a reasoned decision about having an abortion be sufficiently mature to take on the enormously complex task of parenthood? And how can it be in the best interest of a minor

2. Jamin B. Raskin, *The Paradox of Judicial Bypass Proceedings*, 10 AM. U.J. GENDER, SOC. POL'Y & L. 281 (2002).

who is not mature enough to make a decision about abortion to be required to have a child and assume the responsibility of raising it? In concluding that the current standard is “unnecessarily and dangerously broad,” Professor Raskin proposes an alternative doctrinal formulation to be applied when a judge finds that the maturity standard is not met: Is a “desired abortion . . . contraindicated because bringing the pregnancy to term is ‘medically necessary’ to protect her (the young woman’s) health or life?”³ Any other rationale for denying the abortion, Professor Raskin argues, should be a violation of *Casey*’s “undue burden” standard. Professor Raskin goes on to explore the parallel legal regime that would govern if a state sought to require parental notification or consent if a minor wanted to bring a pregnancy to term. He wonders if, under the two-pronged test of maturity and best interest, a judge could find, first, that a young woman was not mature enough to have and care for a child and, second, that it was not in her best interest to bring the pregnancy to term. In applying his analysis of the standard that should govern the abortion decision of an insufficiently mature minor to a similar young woman’s decision to have a child, he argues that only the test of “medical necessity” should prevail in either situation. Although he finds it deeply troubling to deny either young woman the right to her decision, he urges all to confront and address the distressing parallels in these two situations. Finally, Professor Raskin suggests the animating reason behind what he calls the “bypass paradox.” If, under the required legal tests, virtually all requests must be granted, then the only purpose the hearings serve is to shame and degrade young women for attempting to exercise their constitutional right.

Jennifer Blasdell, a Staff Attorney at the National Abortion Federation, catalogues the many harms that young women suffer from parental involvement laws.⁴ By creating delay, the procedures required to notify parents or obtain their consent or to go through the judicial bypass process endanger a young woman’s health and demand extraordinary effort at a time of crisis and vulnerability. The procedures add additional expenses, which are in many situations great burdens for young women with few resources and little access to substantial sums of money. Rather than fostering communication and support within a family, these laws can often make young women, who cannot inform their parents of their pregnancy, feel even more

3. *Id.* at 282.

4. Jennifer Blasdell, *Mother, May I?: Ramifications for Parental Involvement Laws for Minors Seeking Abortions Services*, 10 AM. U.J. GENDER, SOC. POL’Y & L. 287 (2002).

alone as they must go through many more steps on their own. Further, society, through these laws, clearly conveys the message to these young women that they are taking an action that is wrong and dangerous. All of these harms, singly or in combination, result in many young women being discouraged or barred from obtaining an abortion. In addition to creating harm, Ms. Blasdel argues that judicial bypass procedures violate a young woman's right to privacy and interfere with her decisions about the most intimate and substantial matters in her life. She identifies the many areas of medical decision-making where minors are given far greater autonomy and privacy than they have regarding abortions. While Professor Raskin identifies the paradox of judicial bypass, Ms. Blasdel demonstrates how it operates as a procedural escape hatch from the otherwise unconstitutional burden of parental involvement.

The final commentator, Betsy Cavendish, the Vice President and Legal Director and General Counsel of the National Abortion and Reproductive Rights Action League, places parental involvement laws and judicial bypass procedures in the context of larger legal and political developments regarding abortion.⁵ Her account of the political battles surrounding the development of Supreme Court doctrine demonstrates how each aspect of constitutional law cannot be viewed outside of the ideological and strategic maneuvering of the forces advocating for and opposed to abortion. She also explains how the changes in Supreme Court doctrine that culminated in *Casey*⁶ created the space for legal strategies at the state level that operate to make abortion less accessible and more difficult to obtain. This space has permitted parental involvement and judicial bypass laws to flourish as an instrument in the broader battle over abortion.

The dramatization of the judicial bypass process and the commentaries that follow provide a way to bring together Supreme Court doctrine, state law, judicial proceedings, political battles, and the experiences of people affected by the operation of our legal system. These commentaries provide an opportunity to explore not just issues around abortion, but also the roles of lawyers, judges, state legislatures, advocates, and the Supreme Court. Most importantly, they put at the center of this inquiry the experiences of one person, a young woman named Maggie, who must live within the parameters that the law shapes for all in our society.

5. Elizabeth A. Cavendish, *Casey Reflections*, 10 AM. U.J. GENDER, SOC. POL'Y & L. 307 (2002).

6. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).