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The Paradox of Judicial Bypass Proceedings

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THE PARADOX OF JUDICIAL BYPASS PROCEEDINGS

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As a judge conducting an abortion bypass hearing and trying to follow in good faith the *Casey* Court's instructions,[1] you very quickly confront the paradox of the Court's decision. The law thrusts you into the center of this most private existential crisis in the life of a young woman presumably so you can use your wisdom to help her choose, but you quickly realize that there is no point at which you can legitimately deny the young woman an abortion unless it is medically indicated. That is, except for reasons of her health or safety, there will never be a logical point at which you can veto the abortion decision unless you, the judge, happen to be ideologically opposed to abortion and are determined to have your way over her will. This would, of course, be the definition of tyranny.[2]

Here is why there is nothing really to decide. If the question is simply whether the young woman wants to have an abortion, obviously she does – that is what she is here for. So, then the judge must ask whether she is mature enough to make her own decisions.[3] If she is, then she obviously must be granted the right to go ahead with the procedure.

However, if she is deemed not sufficiently mature to make the

* Professor of Law, *American University, Washington College of Law*. This Essay is based on remarks at the Founders' Day Symposium entitled "Unburdening the Right to Abortion: *Casey's* Undue Burden Standard" on March 27, 2001. I wish to thank my colleague Professor Ann Shalleck for her insightful comments.

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

> If neither a parent nor a guardian provides consent, a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests.

Id. at 899.

2. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1279 (10th ed. 1999) (defining the term "tyranny" to mean an "oppressive power exerted by government," or "a rigorous condition imposed by some outside agency or force").

3. *See Casey*, 505 U.S. at 899.

decision, then the judge must ask whether it is in her "best interests" to have an abortion or to have a child.[4] Yet, how can a girl or young woman be too immature to decide whether to have a baby, but mature enough to go through pregnancy, give birth, and make a thousand important decisions regarding how to nurture, raise and educate the child (or children, in the case of twins or other multiples)? It is impossible to believe that a girl too immature to decide for herself whether to have a baby could also be responsible enough to become an effective mother a few months later. Thus, it would *never* be in the best interest of such an immature young person seeking an abortion to be denied one and instead forced to go through the complicated physical, emotional, and personal changes imposed by pregnancy, childbirth, and motherhood. I think that even a pro-life judge would be hard-pressed to conscript the young woman's body and life in this way, but if one did, it would clearly be an exercise in private ideological tyranny.

The only case in which a judge could logically and ethically overrule an immature woman's decision to seek an abortion would be if that abortion, for whatever reason, were going to pose to her substantial medical risks – risks greater than those associated with childbirth – and she could not fully appreciate or weigh those risks in the decision-making process. This is obviously an extraordinarily rare, if not imaginary, kind of case, since it is well-known that, in general, childbirth is far more complicated and risky to the woman than are the vast majority of abortions.[5] But assume, *arguendo*, that an immature and upset teenager does not learn she is pregnant until the end of the sixth month, or has just tried to deny and suppress the whole thing until that point, and the physician now believes the medical risks of the procedure in her case are much greater to her than those associated with going forward with the pregnancy and childbirth. In this situation, the judge really does take the place of the parents and may theoretically act in the young woman's best interest to choose childbirth over abortion, even over her express desires.

Again, this would be a most exceptional case. In all others, mature girls seeking an abortion should be able to get one since it is

4. *See id.*

5. "Having an abortion, after all, will virtually always entail less medical risk to a pregnant woman than will childbirth . . . ." David Meyer, Lochner *Redeemed: Family Privacy After* Troxel *and* Carhart, 48 UCLA L. REV. 1125, 1170 n.232 (2001) (citing *Planned Parenthood v. Danforth*, 428 U.S. 52, 78 (1976), which stated that an abortion using saline-amniocentesis "is safer, with respect to maternal mortality, than . . . continuation of the pregnancy until normal childbirth").

fundamentally their choice and no one has any right or reason to interfere. Immature girls seeking an abortion should also be able to get one since it too is fundamentally their choice – no one has any right or reason to interfere, and the consequences of compelled childbirth would obviously be disastrous for her, the child and everyone else involved.

If I am right about this, the *Casey* standard is written in an unnecessarily and dangerously broad way. The question for a judge in the case of an immature girl seeking an abortion is not what would be abstractly in her "best interests," but rather whether a desired abortion is counter-indicated because bringing the pregnancy to term is "medically necessary" to protect her health or life. Any other rationale for denying such a woman a sought-after abortion should be deemed categorically an "undue burden," an impermissible interference with her privacy right and the placement of a substantial obstacle in the path of her abortion choice. The judge's role really should be occupied by a physician because the only place for legitimate discretion in reviewing the young woman's wishes is in deciding a medical issue.

Intriguingly, if we concede that sometimes the state really might have a valid constitutional interest in forcing an immature young woman to give birth for medical reasons, then we must acknowledge that the converse is true too. A state could require pregnant minors to get parental consent before seeing a pregnancy through to childbirth. If a girl's parents refused on the grounds that an abortion is in her best interests, she could be forced to go before a judge for a judicial childbirth bypass hearing. There, the judge would determine whether she is, in fact, mature enough to make the decision to become a mother (or to become a mother again). If so, she would be free to have the baby. If not, the judge would then consider what is in her best interests. Now, I can very easily imagine a judge saying, "You're a tenth grader, you have no skills, no money, your boyfriend has no way to help you, and you will be sacrificing your whole education, life and career by having this baby. You shall have an abortion." But as much as I suspect the judge would be right in his or her assessment of such a situation, I could not stomach the result that a judge would be forcing a young woman to have an abortion just because of his own estimate of what makes life worth living and meaningful. What if the girl has an instinctive sense that she will be a great mother? What if she is forced to abort and then can never conceive again? It simply seems totalitarian to allow the state to

deprive people, even immature girls, of this fundamental and defining life choice.[6]

However, if the decision to have a child will present substantial *medical* risks and the judge believes the immature girl cannot properly weigh those risks, then again I believe this is indeed a case in which the court could override her express wishes. It does not make me completely comfortable, but I see the logic of denying immature young women the right to have babies in the interests of their own health and safety, but for no other reason. In any event, the champions of the judicial bypass hearing should recognize that this is the logical corollary of their own position.

If the presence of a substantial medical risk is the only valid reason that the state would have to override a young woman's decision to have an abortion, most of the questions asked by judges in trying to ascertain the petitioner's "best interest" are simply irrelevant. The question of her relationship to the father of the potential child, whether she has a boyfriend, how she gets along with her parents, what her social life is like, what her favorite classes are, whether she has ever used drugs or alcohol, and so on simply have nothing to do with the only legitimate inquiry, which is: what are the relative medical risks attendant to both the abortion procedure and pregnancy and childbirth?

Indeed, I venture to say that these searching voyeuristic hearings function primarily to generate titillation and vicarious thrills for the adults involved and to humiliate and to shame the young woman. The vast majority, if not all, of the petitioners will be allowed to get their abortions because of the bypass paradox, but not before first divulging the most intimate details of their lives to a judge or magistrate in an open courtroom. The juvenile abortion interrogation process essentially forces a young woman to wear a judicial scarlet letter "A," signaling abortion. Thus, in the final analysis, the balance struck in *Casey* by Justice O'Connor[7] nicely mirrors the basic social consensus around abortion; ultimately women will be able to exercise a whittled-down right to the

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6. *See* Jed Rubenfield, *The Right of Privacy*, 102 HARV. L. REV. 737, 737 (1989) (arguing that laws which deprive women of the right to choose an abortion are totalitarian in nature).

> A few legal prohibitions, such as that of abortion, have such profound affirmative consequences that their real effect is to direct a person's existence along a very particular path and substantially shape the totality of her life. Such laws, the author argues, are properly viewed as totalitarian in nature.

Id.

7. *See generally Casey*, 505 U.S. at 833.

procedure, but they may have to pay the price of social shaming, professional probing, and official harassment along the way. All women under *Casey* must face the threat of hostile anti-abortion regulations, but teenagers face the most stern censoriousness as they are the most vulnerable and exposed group in the female population.