

Judicial Bypass Procedures

Undue Burdens for Young People Seeking Safe Abortion Care

Young people need confidential and safe access to the full range of reproductive and sexual health services – including abortion. In many states people under 18 may independently consent to a range of sensitive health care services, yet those seeking safe abortion care are singled out under the law. As of January 2015, thirty-eight states enforce laws that require a young person under 18 to notify or obtain consent from one or both parents before she can receive abortion care.¹ The Supreme Court has allowed these laws, so long as they include narrow exceptions, generally called “judicial bypass” procedures, which require minors to receive court approval to access abortion care when they do not have their parents’ knowledge or consent.

Judicial bypass procedures put judges – who are not doctors, not counselors, not experts in health or youth development – in the position of making reproductive healthcare decisions for the young people before them. The procedures are based on unclear legal criteria which create the double standard of requiring young people seeking bypasses to be “mature” enough before they may choose to have an abortion but not have a child. Implementation of the procedures is full of logistical nightmares that push some young people through the cracks and provide no check against bias and lies. These judicial bypass procedures are demeaning, onerous, and stand in the way of young people’s access to safe abortion care.

WHAT DOES JUDICIAL BYPASS LOOK LIKE?

The Supreme Court allows states to implement laws that require minors seeking abortions to notify one or both parents or require one or both parents to consent *if* they include an alternate procedure we now know as judicial bypass. Today, parental involvement laws are in effect in thirty eight states. Eight states add the additional burden of requiring that parental consent forms be notarized. Kansas, for example, requires that two parents give their consent in front of a registered notary.² A few states allow a

grandparent, other family member, or doctor to give permission in lieu of a parent, but most require a judge’s permission in the form of a judicial bypass waiver.³

The Unclear Criteria for Judicial Bypass Procedures

In 1979’s *Belotti v. Baird* the Supreme Court laid out the criteria for judicial bypass procedures: they stated that to be constitutional, a procedure must allow pregnant minors to go before a judge in a proceeding that ensures her anonymity and is conducted with “sufficient expedition” to actually allow her to obtain abortion care. The judge must then decide 1) if she has proven that that she is “mature enough and well enough informed to make her abortion decision, in consultation with her physician, independent of her parents’ knowledge; or 2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.”⁴ Within these guidelines judges are given wide discretion in how they may make decisions for the young people that ask them for a bypass.⁵

- Some states require that a minor present a great deal of evidence to prove to a judge she is “mature enough and well enough informed” before a judge may grant a waiver.⁶
- In 2003, a young woman in Arizona sought a judicial bypass waiver. The Arizona courts required that she provide “clear and convincing evidence” that she was mature enough – a much higher burden than is often applied in civil cases. They justified this heightened standard as necessary in part to protect her parents’ interests, and because of the “magnitude” of the issue of abortion. Under their stringent standards, the woman’s evidence that she had received counseling from Planned Parenthood on all medical and emotional aspects of her decision and that she was a good student was not enough. Her petition was denied.⁷
- A few states require judges consider specific criteria to decide if a minor petitioning

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for a bypass meets the “mature enough” test. For example, Florida directs judges to consider a variety of factors, including the minor’s age, “overall intelligence,” “emotional development and stability,” “credibility and demeanor,” “ability to accept responsibility” and to understand the “consequences” and “medical risks.”⁸

The Circular Logic of the “Maturity” Requirements

In laying out its “mature enough and well enough informed” standard, the Supreme Court made sweeping generalizations about the young people who would be seeking judicial bypasses. It gave as its reasoning for the standard: “Minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them.”⁹ Further, in creating the “maturity” standard, the Court set up an illogical standard for young people seeking judicial bypasses: they must either be deemed mature enough to decide to have an abortion, or if not deemed mature enough for that decision, they must carry a pregnancy to term and possibly raise a child. It also exposed young people to arbitrary determinations of what it means to be “mature” enough to seek abortion care:

- In 2013, a 16-year old young woman in Nebraska was forced to file for a judicial bypass because she was in foster care. Even though she was unable to turn to her parents even if she had felt comfortable involving them, and she raised her own siblings after her mother left, the judge decided that she wasn’t “mature” enough to decide for herself and denied her the abortion. That decision was upheld by the Nebraska Supreme Court.¹⁰
- In 2011, a judge in Ohio denied a young woman’s petition for a judicial bypass because “[i]n a somewhat circular argument ... she did not have enough life experience to take care of a child [and therefore] she was not mature enough to decide whether

to have an abortion.”¹¹ That decision was overturned by an appellate court after a full month had passed while the young woman waited for a final decision.

A Series of Logistical Nightmares

Generally, judicial bypass procedures require pregnant minors to fill out certain forms in a specific court explaining the situation, and direct the court to consider her petition in a short time period. Sometimes they require she be given a legal advocate. Staff and judges in some courts do not actually know the legal requirements of the process or how to carry it out.¹² Within the requirements of the law and the realities of the U.S. court system, the judicial bypass process is often a logistical nightmare for the young people who seek to use it.

- In one court, the administrator observed: “I dare say most judges in [our state] wouldn’t know what the bypass is or how to do it. I’d be fearful many might call a young woman’s home.”¹³

In addition, if judges do not want to be involved in helping a teenager obtain safe abortion care, they can actually choose *not* to handle judicial bypass procedures.¹⁴ Additionally, in rural areas, there have been times when there was no judge available to hear a judicial bypass petition at all.¹⁵ Because of these complications, it may take up to three weeks for a decision to be made, putting the minor further along in her pregnancy.¹⁶

A System that Allows Bias

Judges who do agree to hear petitions are given wide discretion to make their decisions, which can subject young people to harmful biases. Questions asked at judicial bypass hearings range from “Does she have a plan for dealing with possible complications arising from the abortion?” to “*What if we found you perfect adoptive parents or I gave you \$2000 today to have the baby?*” and “*How many times did you have sex? Where did you do it?*”¹⁷ Some judges have even gone out of their way to impose their beliefs on the young people before them, suggesting turning to religion and even naming and appointing advocates for fetuses.¹⁸

- In 1996, an Alabama judge denied a young woman’s petition for a judicial bypass, in part because, her “action in becoming pregnant in light of sex education in the schools and the extreme amount of publicity about teen pregnancy is indicative that she has not acted in a mature and well informed manner.”¹⁹ Three

years later, when another young woman in Alabama filed for a judicial bypass, the judge who took her case appointed an anti-choice lawyer to represent her fetus. That lawyer named her fetus “Baby Ashley” and forced her to answer questions including “You say that you are aware that God instructed you not to kill your own baby, but you want to do it anyway?” on the record in court.²⁰

THE BURDEN OF JUDICIAL BYPASS

Every person faces their own unique circumstances, challenges, and potential complications. Young people in particular are more likely to face barriers to accessing safe abortion care and may be forced to delay an abortion because they need time to assemble the funds, or lack transportation or access to a provider. This is why it is important that they are able to make their own decisions based on what is right for them and their loved ones. Instead, parental consent and notification laws, and the judicial bypass processes they create, add to the burdens forcing young people to delay safe medical care.

- In 2000, the Texas Supreme Court granted a young woman’s petition after her second series of appeals – a full month after her attempt at a judicial bypass began. They noted that the length of time her ordeal had taken potentially forced her to undergo a more complicated and expensive second trimester abortion procedure rather than a first trimester procedure. In doing so, one of the judges revealed the purpose of judicial bypass requirements: “Once a minor becomes aware of what she must go through to obtain a judicial bypass, she will choose for herself to involve her parents.”²⁵

Sometimes the onerous hurdles block access to safe abortion care entirely. Once a judge denies permission to obtain abortion care, the decision may be almost impossible to overturn.²⁶

- In 2001, a 17 year old woman in Mississippi discovered she was twelve weeks pregnant. Because both of her parents had died, she filed for a judicial bypass. The trial court denied her petition, and five months later, after the case made its way up to the Mississippi Supreme Court, the Court upheld the denial of her petition. It based its decision on the ground that the young woman was unaware of the scientifically dubious “medical risks associated with abortion, the danger to subsequent pregnancies, or the possibility of future infertility.”²⁷

MAKING JUDICIAL BYPASS EVEN MORE DIFFICULT

Recently, state legislatures have begun to make judicial bypass procedures even more onerous.

- *In 2014 Alabama passed a new law which “radically alters the judicial bypass process in a wholly unprecedented manner that goes well beyond any judicial bypass statute that has ever been upheld by a federal court.”²¹ When a person petitions for a judicial bypass, the District Attorney is automatically notified and may defend the interests of the minor’s fetus. The judge may also appoint an advocate directly for the fetus. If the minor’s parents know of the bypass proceeding already, the court must allow them to participate. The District Attorney, fetus’s advocate, and parents may call any witnesses they want to testify against the young person’s decision – including witnesses who may be the very reason the person has chosen to ask for a judicial bypass in the first place, such as an abusive partner or family member.²²*
- *Meanwhile, in Texas in May 2015, the legislature passed additional restrictions on judicial bypass which would require a higher standard of proof that the minor cannot get parental permission, extend the time a judge may deliberate from 2 days to 5 days, and require most minors to seek bypass only in their home county.²³*
- *In fact, since 2010, eleven states have made it harder to obtain a judicial bypass by restricting which courts can grant them, how they can be requested, and what evidence must be provided to judges who grant them.²⁴*

Even when the judicial bypass procedures go smoothly, they force young people who are seeking abortion care into tough positions to get the care they need. As one woman shared with Advocates for Youth’s 1 in 3 Campaign, “society has everyone think that we have no power over our own bodies and choices, and at 15 legally we almost have none... I knew I had to get this abortion without my mom’s consent because she would not allow it to happen, so after all of my research I found out that I would be able to have an abortion only with my mom’s consent. I found out that I had to get a waiver signed by a judge... So I lied to my brother (knowing that he was anti-abortion) and made up a different story convincing him to take me to the court house.”²⁸

THE RIGHT APPROACH: STRIKE PARENTAL INVOLVEMENT LAWS ENTIRELY

Young people deserve the right to access the full range of reproductive and sexual health services they need. That right includes the ability to access reproductive and sexual health services confidentially and with dignity. Most young people seeking abortions involve their parents, but there are

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a variety of reasons that is not always possible. One study found that thirty percent of pregnant teens who do not tell their parents about their abortions make that decision because they fear violence or being kicked out of their homes.²⁹ Young people who are not threatened with abuse in their homes may be afraid to let their families down or be uncomfortable involving their parents. However, the majority of states mandate parental involvement for almost all young people under 18 who seek abortion care, leaving many vulnerable to violence, homelessness, forced pregnancy continuation, and unsafe illegal abortions.

Judicial bypass exceptions do not ease the burden created by parental involvement laws. Far from ensuring that minors who cannot involve their parents are able to obtain the abortion care they have a right to, instead judicial bypass procedures are demeaning, unfair, and at times insurmountable. Judicial bypass procedures put young people on trial to receive the services they need. To truly ensure that young people have access to the full range of reproductive and sexual health services they need, parental involvement laws must be repealed entirely.

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