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Staying Open: How Restricting Venue in Texas's Judicial Bypass Cases Would Hurt Minors and Violate the Constitution.

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STAYING OPEN: HOW RESTRICTING VENUE IN TEXAS'S JUDICIAL BYPASS CASES WOULD HURT MINORS AND VIOLATE THE CONSTITUTION

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I. INTRODUCTION

Like many states, Texas mandates parental involvement in minors’ reproductive decision-making by requiring an unemancipated minor to obtain parental consent for an abortion.¹ Texas may constitutionally restrict access to abortion in this manner because it allows minors to quickly and confidentially seek judicial waiver of the requirement through a process known as a judicial bypass.² A key aspect of judicial bypass proceedings is that a girl may petition for a waiver of parental consent in any county,³ which allows the minor to protect her anonymity and seek county officials adequately prepared to aid her in this process. This “open venue” clause came under attack in the last legislative session. Texas House Bill 1212 would have restricted a minor to petitioning for a judicial bypass to only “[her] county of residence or in the county in which she intends to have the abortion performed.”⁴ This Article will explain how, although House Bill 1212 could prevent venue-shopping,⁵ restricting available venues would prevent a significant number of minors from accessing judicial by-

1. Guttmacher Inst., *Parental Involvement in Minors’ Abortions*, 2006 ST. POLICIES IN BRIEF 1, available at http://www.agi-usa.org/statecenter/spibs/spib_PIMA.pdf [hereinafter Guttmacher] (last visited Sept. 14, 2006).

2. See TEX. FAM. CODE ANN. § 33.002(a)(1)-(2) (Vernon 2002 & Supp. 2005–2006).

3. *Id.* at § 33.003(b); TEX PARENTAL NOTIFICATION R. § 2.1(a) (2000).

4. TEX. H.B. 1212, 79th Leg., R.S. (2005), available at <http://www.capitol.state.tx.us/tlo/79R/billtext/HB01212H.HTM> (last visited Sept. 14, 2006).

5. Christy Hoppe, *OK Expected for Parental Consent Bill: Measure Would Stiffen Rules for Young Women Seeking Abortions*, DALLAS MORNING NEWS, Apr. 26, 2005, at 4A, available at 2005 WLNR 2467834 (criticizing the open venue law as inviting venue-shopping for sympathetic judges in liberal counties).

pass proceedings, thus jeopardizing the constitutionality of the entire process.⁶

Meaningful access to a judicial bypass protects some of Texas's most vulnerable minors. The availability of the proceedings is essential to the scheme's compliance with the Constitution.⁷ Ending open venue would prevent many minors from utilizing the judicial bypass process at all because many county officials are unprepared or unwilling to provide assistance. Also, without the confidentiality afforded to minors by open venue, minors will be deterred from seeking a judicial bypass at all in their own county.

II. JUDICIAL BYPASSES PLAY AN IMPORTANT ROLE IN PROTECTING VULNERABLE MINORS

Most girls involve their parents when deciding whether to continue an unexpected pregnancy,⁸ and those who request a judicial bypass do so for a good reason. In Texas, the only hotline offering legal counseling to pregnant minors reports that from 2001 to 2005, seventeen percent of callers reported being physically abused by a parent or guardian, thirty-eight percent had been kicked out or threatened with being kicked out of their homes for becoming pregnant, and twenty percent reported a high probability of being forced by family members to continue an unwanted pregnancy.⁹ Even those not facing physical danger, homelessness, or family alienation had few resources. Thirteen percent of callers were already "supporting at least one child[.]" and thirty-five percent were unemployed.¹⁰

6. See generally *Doe v. Burton*, 410 U.S. 179 (1973) (holding a state may not unduly burden a woman's fundamental right to an abortion).

7. *Id.*

8. Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 196 (1992) (concluding that in states devoid of parental involvement laws, approximately seventy-five percent of teens seeking abortions had told their parents about the pregnancy).

9. JANE'S DUE PROCESS, INC., ANNUAL REPORT 2 (Jan. 1, 2004–Aug. 31, 2005) (hereinafter ANNUAL REPORT). Jane's Due Process is a 501(c)(3) organization that operates a legal hotline and lawyer referral service for pregnant teens and provides training on the law to clerks, pro bono attorneys, community members, and family-planning clinics. The survey was conducted by telephone because it is a likely means for pregnant minor to make an anonymous request for information. See also 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, 129–40 (2003) (describing in-depth interviews conducted with Massachusetts teens regarding the reasons they wished to avoid telling their parents about their choice to have an abortion). These statistics come from initial screenings, when many callers are reluctant to share personal information.

10. See Tali Woodward, *The Prop. 73 Puzzle*, SAN FRANCISCO BAY GUARDIAN ONLINE, http://www.sfbg.com/40/05/news_og_abor.html, for a discussion of the real-world ef-

The judicial bypass application system itself provides an effective screening mechanism because the procedure further dissuades girls from obtaining an abortion by requiring the girl to speak on the record to a strange adult about her sex life. Although some girls may underestimate the support they will receive from their parents,¹¹ the question presented here is how the inability to access a judicial bypass affects those girls who have legitimate fears.¹² Some parents abuse their daughters, and the revelation of a teenage pregnancy can have dire physical consequences.¹³ Without the possibility of a judicial bypass, these girls would have no choice but to reveal a pregnancy, either to obtain consent for an abortion, or when the physical signs can no longer be hidden. Either reason could jeopardize the minor's physical safety, emotional wellbeing, and standing within the family and community. These already vulnerable girls, especially those near the border, may consider obtaining a dangerous back-alley procedure.

Another reason the parental consent provision is an unconstitutional obstacle to a woman's access to an abortion is that many girls living alone or with a non-legal guardian (such as a grandmother or aunt) simply have no contact with their parents, making compliance with the consent requirement unattainable.¹⁴ Thirty-five percent of Jane's Due Process callers report they do not know how to reach at least one parent, because he or she is "missing, deceased, or incarcerated."¹⁵ Five percent of callers

fects of parental involvement laws and how they endanger teens' physical health. *See also* Ted Joyce, Nat'l Bureau of Econ. Research, Inc., Health Economics Program Meeting, Changes in Abortions and Births Following Texas's Parental Notification Statute: A Regression Discontinuity Approach 14 (Apr. 22, 2005) (transcript available at Nat'l Bureau of Econ. Research Inc., *available at* <http://www.nber.org/confer/2005/hes05/joyce.pdf>) (illustrating how parental involvement laws have influenced teens on the cusp of their eighteenth birthdays to wait and have a more dangerous abortion later in their pregnancies).

11. Teresa Stanton Collett, *Seeking Solomon's Wisdom: Judicial Bypass of Parental Involvement in a Minor's Abortion Decision*, 52 BAYLOR L. REV. 513, 587 (2000).

12. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 894 (1992) ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.").

13. *See* Molly Ivins, *In Texas, Among the Horrors Awaiting Us Is H.B. 1212, Mandating Parental Consent for the Performance of an Abortion*, THE TEX. OBSERVER, Feb. 24, 2005, *available at* http://www.janesdueprocess.org/gen_info/media_inquiries/horror_stories.htm, for true stories of the abuse faced by Jane's Due Process callers; *See generally* TEX. FAM. CODE ANN. § 33.003(i) (Vernon 2002 & Supp. 2005–2006) (stating if notification of parents would likely lead to the minor's physical, sexual, or emotional abuse, the court may authorize the minor's consent to obtain the abortion without parental notification).

14. *See* Woodward, *supra* note 10 ("The ones who go through the process are the ones who just can't tell their parents. They don't live with their parents—a lot of them are de facto orphans. If people don't think those girls exist, they're very naïve[.] They're in every neighborhood.").

15. *See* ANNUAL REPORT, *supra* note 9, at 2.

report being unable to contact either parent.¹⁶ Without the option of a judicial bypass, these girls would have no choice but to continue an unwanted pregnancy, even if the adult they live with approves of their choice to obtain an abortion.

Some parents have a moral objection to abortion but are willing to accept their daughter's decision to obtain one.¹⁷ In these cases, parents feel a moral obligation to withhold consent, but are nonetheless willing to go along with bypass proceedings. For these families, the bypass option enables a pregnant minor to exercise her constitutional right, while providing her parents with a morally acceptable way to respect their daughter's choice.

III. JUDICIAL BYPASSES ARE ESSENTIAL TO THE CONSTITUTIONALITY OF TEXAS'S ABORTION LAWS

As written, Texas's parental consent law is constitutional. If the law did not provide for judicial bypass, however, the law would violate the constitution by giving a minor's parents a third-party veto over her reproductive decision-making.

A. *Texas's Law*

Texas legislators passed a parental consent requirement in the 2005 legislative session.¹⁸ The Legislature did so without revoking the preexisting notification requirement.¹⁹ As a result, Texas is one of twenty-one states requiring parental consent,²⁰ and one of thirteen states requiring parental notification.²¹ The Texas statutes provide for an expedited and confidential judicial bypass proceeding²² that allows minors to seek a judge's permission to make the abortion decision without involving her parents.²³

16. *Id.*

17. Interview by Susan Hays with group of girls, in Austin, Tex. (Mar. 24, 2005) (on file with The Scholar: St. Mary's Law Review on Minority Issues).

18. TEX. OCC. CODE ANN. § 164.052 (Vernon 2005).

19. TEX. FAM. CODE ANN. § 33.002 (Vernon 2002 & Supp. 2005–2006).

20. TEX. OCC. CODE ANN. § 164.052(a)(19) (Vernon 2005); Guttmacher, *supra* note 1, at 1.

21. TEX. FAM. CODE ANN. § 33.002(a)(1)(A) (Vernon 2002 & Supp. 2005–2006); Guttmacher, *supra* note 1, at 1.

22. TEX. FAM. CODE ANN. § 33.002(a)(1)(A) (Vernon 2002 & Supp. 2005–2006); TEX. OCC. CODE ANN. § 164.052(a)(19) (Vernon 2005). A layperson attempting to determine the laws governing a minor's access to abortion would need to refer both to the Texas Family Code, which contains the notification requirement and the provision allowing for a judicial bypass, and to the Texas Occupational Code, which requires consent. Rules laying out the procedures for obtaining a bypass are not contained in the Texas Family Code at all, but rather appear in rules promulgated by the Texas Supreme Court.

23. *Id.*

The availability of these proceedings protects the constitutional rights of minors and their parents by accounting for both the right of a minor to make reproductive choices and the rights of her parents to act in her best interest. Finally, the open venue provision allows a girl to obtain a bypass in any Texas county,²⁴ ensuring access to the proceedings.

B. *The Bellotti*²⁵ Standard

Parental involvement laws present the courts with a unique balancing problem, requiring the court to weigh a minor's right to reproductive liberty against the rights of parents to make decisions regarding the health and safety of their children without state interference. In *Roe v. Wade*,²⁶ the Supreme Court recognized a woman's right to seek an abortion.²⁷ In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²⁸ the Court reaffirmed this right, holding that a state may not impose regulations that have the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."²⁹ The Court found that mandatory spousal notification posed such an obstacle³⁰ because it had the effect of discouraging women from seeking abortions altogether,³¹ effectively giving a spouse the ultimate power of choice.³²

In *Planned Parenthood of Central Missouri v. Danforth*,³³ the Court held that states may require parental involvement in the abortion decision, but cannot give parents absolute authority to veto this decision during the first twelve weeks of pregnancy.³⁴ The Court in *Bellotti v. Baird*³⁵ delineated guidelines for how such legislation may avoid placing an undue burden on a minor seeking an abortion.³⁶ The Court held that any parental involvement law "must provide an alternative procedure whereby authorization for the abortion can be obtained."³⁷ The proce-

24. TEX. FAM. CODE ANN. § 33.002 (Vernon 2002 & Supp. 2005–2006) ("The application may be filed in any county court at law, court having probate jurisdiction, or district court, including a family district court, in this state.").

25. 443 U.S. 622 (1979).

26. 410 U.S. 113 (1973).

27. *Roe*, 410 U.S. at 153.

28. 505 U.S. 833 (1992).

29. *Casey*, 505 U.S. at 877.

30. *Id.* at 893–94 (considering the ramifications spousal notification laws).

31. *Id.* ("[F]or many women [spousal consent] will impose a substantial obstacle.").

32. *See id.* (reasoning that a spousal consent requirement would have the same effect as a law prohibiting abortion altogether).

33. 428 U.S. 52 (1976).

34. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 72–75 (1976).

35. 443 U.S. 622 (1979).

36. *Bellotti v. Baird*, 443 U.S. at 622 (1976).

37. *Id.* at 643.

dures must: (1) allow the minor to show either (a) that she is mature and well-informed enough to make the decision without involving her parents, or (b) that the abortion is in her best interest; (2) take place expeditiously; and (3) adequately protect the minor's anonymity.³⁸

C. *Measuring Texas's Law Against Bellotti*³⁹

Although debate continues among scholars as to the constitutionality of legislation mandating parental involvement, Texas's law comports with the *Bellotti* standard. Texas meets this three-pronged standard by allowing 1) for a bypass under the appropriate circumstances, 2) requiring that the proceedings take place quickly, and 3) protecting the minor's anonymity.

The Texas Family Code satisfies *Bellotti*'s first prong by allowing the court to decide "whether the minor is mature and sufficiently well informed to make [the decision] without notification of either of her parents . . . or whether notification is in the best interest of the minor[.]"⁴⁰ Texas allows for a judicial waiver of the consent and notification requirements in cases where a minor shows, by a preponderance of the evidence,⁴¹ that she is mature and sufficiently well informed to make the decision independently,⁴² notification would not be in her best interest,⁴³

38. *Id.* at 643–44.

39. *Bellotti v. Baird*, 443 U.S. 622 (1979).

40. TEX. FAM. CODE ANN. § 33.003(i) (Vernon 2002 & Supp. 2005–2006).

41. *Id. In re Doe 4*, 19 S.W.3d 322, 325 (Tex. 2000) (declaring that "[i]f the minor's uncontroverted testimony to this effect were clear, positive, and direct, and not impeached or discredited by other circumstances, the trial court would have to accept it as fact"). "The trial court is not free to disregard [uncontroverted testimony] merely because the court does not believe the witness to be credible." *In re Doe 4*, 10 S.W.3d 322, 325 (Tex. 2000).

42. *In re Doe (Doe 1)*, 19 S.W.3d 249, 255 (Tex. 2000) ("[A] minor is mature and sufficiently well informed . . . when the evidence demonstrates that the minor is capable of reasoned decision-making and that her decision is not the product of impulse, but is based upon careful consideration of the various options available to her and the benefits, risks, and consequences of those options."); *In re Doe 3*, 19 S.W.3d 300, 302 (Tex. 2000) (listing the factors in the maturity determination: age, education, academic achievement, extracurricular activities, and future plans); *In re Doe*, 19 S.W.3d at 249 (finding the maturity determination also includes whether the minor has shown that she obtained information on abortion, knows the alternatives, and is cognizant of the "emotional and psychological aspects" of abortion).

43. *In re Doe 2*, 19 S.W.3d 278, 282 (Tex. 2000) (holding when determining the minor's best interests, Texas courts consider "the minor's emotional or physical needs"; emotional or physical danger facing the minor; "the stability of the minor's home and whether notification would cause serious and lasting harm to the family structure; . . . [and] the effect of notification on the [parent-child] relationship").

or notification may lead to her physical, sexual, or emotional abuse.⁴⁴ Texas goes beyond the *Bellotti* minimum by allowing for a minor to obtain a bypass when *making the decision independently* is in her best interest, rather than having the abortion itself.⁴⁵

In accordance with the second prong of *Bellotti*, Texas's bypass proceedings take place expeditiously.⁴⁶ According to the Texas Family Code, a minor is entitled to both a guardian *ad litem* and an attorney.⁴⁷ Furthermore, a judge must rule on the matter within two business days. If a court fails to rule on an application by five o'clock in the evening on the second business day antedating the filing, the application is deemed granted.⁴⁸ If the application is denied, the Texas Family Code provides for a "rocket docket" appeal.⁴⁹

Texas's procedures meet the third prong of *Bellotti* by adequately protecting the anonymity of minors.⁵⁰ The Texas Parental Notification Rules and Forms ("Parental Rules") make extremely clear that the records of bypass proceedings are to be maintained with the utmost confidentiality.⁵¹ For example, these cases are styled "In re Jane Doe." The open venue provision allows girls to seek a judicial bypass in a county away from neighbors and relatives who might recognize them at the courthouse.⁵²

Thus, because Texas's law is drafted in conformity with *Bellotti*, Texas's parental consent requirement passes constitutional muster. Without availability of a judicial bypass, Texas could not impose a consent requirement.

44. TEX. FAM. CODE ANN. § 33.003(i) (Vernon 2002 & Supp. 2005–2006); *In re Doe 2*, 19 S.W.3d at 282 (finding a general fear of telling one's parents is not enough to support a finding that notification is not in the minor's best interest, but sufficient evidence exists to make this finding when "there is more than a scintilla of evidence that notification may lead to Doe's abuse"). *See generally In re Doe 10*, 78 S.W.3d 338, 342 (Tex. 2000).

45. TEX. FAM. CODE ANN. § 33.003(i) (Vernon 2002 & Supp. 2005–2006) (stating when the court finds notification is not in the applicant's best interest, the court's order should authorize the minor to execute the forms without parental notification).

46. *Id.* at § 33.003(g) (instructing the court to make a decision on the minor's application immediately upon the hearing's end; *see also id.* at § 33.003(h) (stating "[t]he court shall rule on an application . . . and shall issue written findings . . . on the second business day after the date the application is filed with the court").

47. *Id.* at § 33.003(e).

48. *Id.* at § 33.003(h).

49. *Id.* at § 33.003(a) (mandating that a Court of Appeals rule within two business days of the filing of the Notice of Appeal).

50. TEX. FAM. CODE. § 33.003(a) (Vernon 2002 & Supp. 2005–2006) (listing steps taken by court to preserve anonymity of the minor).

51. TEX. PARENTAL NOTIFICATION R. § 1.3(a)-(c) (2000) (instructing that any identifying information be removed from court documents).

52. *See id.*

IV. MANY COUNTY OFFICIALS ARE UNABLE OR UNWILLING TO ASSIST WITH JUDICIAL BYPASSES

Although Texas's law meets the requirements of *Bellotti*, the practical realities of its application in Texas are more dubious. District and county clerks are indispensable to bypass proceedings, but in many counties, these officials provide unreliable assistance. Relying on the results from telephone surveys of district clerks' offices conducted by Laura Smith, this section will illustrate how a minor has less than a fifty percent chance of receiving minimal assistance if she is restricted to her county of residence.⁵³ Seeking assistance in a county with an abortion provider slightly increases her chances.⁵⁴ Nevertheless, the practical availability of bypass proceedings remains substantially limited as a result of the minor's county of residence.

A. *The Role of Clerks in Texas*

According to the Parental Rules promulgated by the Texas Supreme Court, minors file an application for a judicial bypass through the district and county clerks.⁵⁵ Upon request, district and county clerks must provide application forms and a copy of the Parental Rules.⁵⁶ "The clerk must give prompt assistance—in a manner designed to protect the minor's confidentiality and anonymity—to persons seeking to file an application."⁵⁷ The clerk is charged with accepting the application, assigning it to the appropriate court,⁵⁸ and providing the court with a copy of the application.⁵⁹ If the reviewing judge fails to make a timely ruling on the application, it is deemed "granted," and the clerk must issue a certificate to this effect.⁶⁰ Thus, clerks play a central role in the application process by making the application available to the public, ensuring each application is presented to a judge, and providing appropriate paperwork in the event the judge fails to rule timely. However, clerks are often not a reliable source of information for prospective applicants. A number of recent surveys demonstrate that clerks in Texas do not provide reliable informa-

53. See Telephone Interview of All District Clerk Offices, in Tex. (Spring 2006) [hereinafter District Clerk Offices] (on file with The Scholar: St. Mary's Law Review on Minority Issues).

54. *Id.*

55. Compare TEX. PARENTAL NOTIFICATION R. § 1.7 (2000), with TEX. OCC. CODE ANN. § 164.052 (Vernon 2005) (demonstrating the Parental Rules will continue to govern bypass proceedings, even though the law now requires consent in addition to notification).

56. *Id.*

57. TEX. PARENTAL NOTIFICATION R. § 2.2(a) (2000).

58. *Id.* at § 2.1(b) (2)-(4).

59. *Id.* at § 2.2(c).

60. *Id.* at § 2.2(g).

tion about judicial bypass proceedings.⁶¹ Furthermore, because most clerks are not prepared to offer information to the public, meaningful access is further limited.⁶²

B. *The Spring 2006 District Clerk Survey*⁶³

In the spring of 2006, a survey was conducted of all 254 district clerks in Texas,⁶⁴ in order to ascertain the quality of assistance clerks were providing by telephone to prospective applicants.⁶⁵ Telephoning allows access to information, without arousing suspicion by having to leave home, and reduces the risk of being recognized by friends or family. Only district clerks were surveyed because they are responsible for “(1) record[ing] the acts and proceedings of the court; (2) enter[ing] all judgments of the court under the direction of the judge; and, (3) record[ing] all executions issued and the returns on the executions.”⁶⁶ In a large number of Texas counties (those with less than 8,000 people), district and county clerk duties are fulfilled by the same person.⁶⁷

1. The Calls

In order to achieve results that could be compared, surveyors used a uniform format for each call. Every person answering the phone in the district clerk’s office would hear, “Hi, I’m calling to find out how a girl who’s not yet eighteen and wants an abortion can get a judge’s permission to avoid telling her parents.”⁶⁸ If asked, the caller would deny that she was calling for herself and indicate she was only calling to get information about the process. Nonetheless, all three surveyors were young women, making it likely to conclude that the caller was requesting information for herself or a friend. The survey results generally indicate what an actual pregnant minor would encounter when seeking information by telephone about a judicial bypass. This survey parallels the format employed by Melissa Jacobs in her 2003 study,⁶⁹ and by Jane’s Due Process

61. Melissa Jacobs, *Are Courts Prepared to Handle Judicial Bypass Proceedings?*, HUMAN RIGHTS (Winter 2005) at 4 (studying district and county court offices throughout Texas in 2003); District Clerk Offices, *supra* note 53.

62. *See* District Clerk Offices, *supra* note 53 (noting the various obstacles to accessing application information).

63. This study was conducted by Laura Smith as part of a semester-long internship at Jane’s Due Process.

64. *See* District Clerk Offices, *supra* note 53.

65. *See id.* (building upon the findings of Melissa Jacobs’s study).

66. TEX. GOV’T CODE ANN. § 51.303(b) (Vernon 2005).

67. *Id.* at § 51.501(a).

68. District Clerk Offices, *supra* note 53.

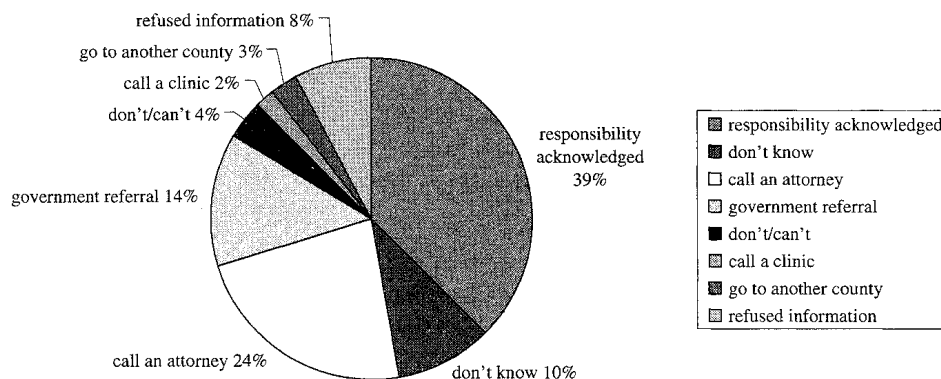
69. Jacobs, *supra* note 61, at 2 (studying district and county court offices throughout Texas in 2003); District Clerk Offices, *supra* note 53.

in 2005.⁷⁰ Professor Helena Silverstein also conducted similar studies in Alabama in 2001,⁷¹ and in Pennsylvania in 1997.⁷²

2. Call Results

The survey indicates that less than half of district clerks' offices were prepared to offer a minimal level of assistance, further showing that open venue is necessary for minors to access bypass proceedings.⁷³ Slightly more than half of those counties with abortion providers were able to offer assistance.⁷⁴ The responses were divided into eight categories: (1) acknowledgment that the office handled judicial bypasses; (2) statements that they did not know about judicial bypass proceedings; (3) referrals to attorneys for advice; (4) referrals to other government offices; (5) clinic referrals; (6) indications that the particular office or county could or would not handle such cases; (7) refusals to give information; and, (8) suggestions that the caller contact another county.⁷⁵

The following chart illustrates the breakdown of responses:



Some “wrong answers,” such as those who said they did not know if the clerk’s office could offer assistance but referred the caller to an abortion or rape crisis clinic, had a reasonable chance of eventually steering the

70. District Clerk Offices, *supra* note 53.

71. See generally Helena Silverstein & Leanne Speriel, “Honey, I Have No Idea”: Court Readiness to Handle Petitions to Waive Parental Consent for Abortion, 88 IOWA L. REV. 75 (2002).

72. See generally Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 LAW & SOC. INQUIRY 73 (1999).

73. See generally *id.* at 79–81. (finding that, in 1997, only eight of Pennsylvania’s sixty judicial districts were able to provide complete information about the state’s parental involvement law); see also Silverstein & Speitel, *supra* note 71, at 106–07 (discussing how the problem of inadequate preparedness of the district courts is not unique to Texas).

74. District Clerk Offices, *supra* note 53.

75. *Id.* at § 3.

caller in the direction of a bypass. Other responses, like one clerk's reply that "supposedly" the law allowed bypasses, but that she did not give them, did not provide the caller with a reasonable amount of information.

a. Answers Acknowledging the Clerk's Responsibility

Almost forty percent of responses acknowledged that the district clerk's office handled judicial bypasses.⁷⁶ In this category, a response merely needed to acknowledge that the paperwork and/or procedure existed, and it was somehow affiliated with the district clerk's office—this being the minimum amount of information necessary for a girl to have a reasonable chance of finding the necessary paperwork and getting a hearing. These responses ranged from detailed descriptions of the process, to simple statements advising the caller that the necessary paperwork could be picked up at the clerk's office.

Some counties offered especially sympathetic assistance. One person answering in Bexar County rattled off the procedure immediately upon request.⁷⁷ Another woman in Bandera County requested the caller's phone number in order to set up a court date.⁷⁸ The clerk from Cochran County invited the caller to meet at her home to ensure privacy,⁷⁹ and respondents in Swisher and Ward Counties were equally aware of privacy concerns.⁸⁰ Similarly, the district clerk's office in Terrell County stressed that after-hours meetings were available.⁸¹ An employee in Oldham County went out of her way to mention the right to appeal and seemed very willing to help.⁸² This willingness to help was equally apparent from employees in Bosque County and Pecos County.⁸³

76. *Id.* at § 4 (finding the counties which acknowledged bypasses were: Anderson, Austin, Bandera, Baylor, Bell, Blanco, Borden, Bosque, Brazos, Briscoe, Brown, Burleson, Burnet, Caldwell, Cass, Castro, Chambers, Cherokee, Childress, Clay, Cochran, Comal, Concho, Cooke, Coryell, Crane, Culberson, Dawson, Denton, DeWitt, Dickens, Ector, Fort Bend, Franklin, Freestone, Gaines, Gray, Hale, Hamilton, Hardin, Harris, Haskell, Hays, Hemphill, Hidalgo, Hill, Hockley, Hood, Houston, Irion, Jackson, Jefferson, Jones, Karnes, Kaufman, Kendall, Kenedy, Kleberg, Leon, Llano, Lubbock, Lynn, Marion, Matagorda, Milam, Montague, Navarro, Nueces, Oldham, Parmer, Pecos, Potter, Rains, Randall, Reagan, Real, Roberts, Schleicher, Shackelford, Stonewall, Sutton, Swisher, Taylor, Terrell, Terry, Throckmorton, Tyler, Val Verde, Victoria, Waller, Ward, Washington, Webb, Wharton, Willacy, Wilson, and Young).

77. *Id.*

78. *Id.*

79. District Clerk Offices, *supra* note 53, at § 4.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

However, some answers acknowledging responsibility (fewer than ten percent) also conveyed potentially discouraging statements.⁸⁴ A woman in Anderson County was happy to offer assistance, but mentioned in passing that sometimes the judge orders counseling with a minister.⁸⁵ Although some girls might welcome a minister's advice, the prospect of discussing her sex life with yet another adult might be enough to prevent a potential applicant from pursuing her application. Additionally, many judges use their role in bypass proceedings to advance a conservative political agenda.⁸⁶

Responses from Real and Caldwell Counties indicate that a judge may not be available or the process might be lengthy,⁸⁷ without mentioning that the matter must be ruled on within forty eight hours, and that a judge's failure to do so would render her bypass "deemed granted."⁸⁸ A caller unaware of this fact would likely give up.

In Kaufman County, the clerk's office suggested that the only way to circumvent the consent requirement was by a showing that the caller was in physical danger, or in danger of getting kicked out of the home.⁸⁹ This clerk was apparently unaware that judicial bypasses are also available to "mature and sufficiently well-informed" minors or those for whom the chance to make the decision independently is in their best interest for other reasons.⁹⁰

The response from Gray County suggested that a girl might need to be sixteen to file,⁹¹ which is untrue⁹² and would have an obvious deterrent effect on any caller younger than sixteen.⁹³

84. District Clerk Offices, *supra* note 53, at § 2.

85. *Id.* at § 4.

86. See Helena Silverstein & Kathryn Lundwall Alessi, *Religious Establishment in Hearings to Waive Parental Consent for Abortion*, 7 U. PA. J. CONST. L. 473 (2004) (discussing the practice of ordering religious counseling as a condition of receiving a judicial bypass waiver).

87. District Clerk Offices, *supra* note 53, at § 4.

88. TEX. FAM. CODE ANN. § 33.003(h) (Vernon 2002 & Supp. 2005–2006).

89. District Clerk Offices, *supra* note 53, at § 4.

90. *Bellotti v. Baird*, 443 U.S. 622, 643–44 (1979).

91. District Clerk Offices, *supra* note 53, at § 4.

92. TEX. FAM. CODE ANN. § 33.003(c) (Vernon 2002 & Supp. 2005–2006) (requiring judicial bypass applicant to be a pregnant minor, unmarried, and under eighteen years of age).

93. *See id.*

b. "I Don't Know" Answers

Ten percent of the people who answered calls simply had no idea what to say.⁹⁴ An "I don't know" from the district clerk's office could effectively terminate a minor's access to the judicial bypass to which she is constitutionally entitled. Many of these responses were given in an annoying tone, either for asking for what the receptionist believed was forbidden legal advice or because the person answering the call found the subject matter distasteful. Some of these responses may not have been intended as judgmental, and were not overtly judgmental, but would not have inspired confidence in a caller. Many times, this type of response was coupled with a verbal expression like "oh my," which indicated to the caller that she was in a bad situation. The overriding message from each of these responses, regardless of motivation, was the same: *You are alone*.

If the office charged with implementing a procedure knows little to nothing about it, the minor may suspect that no one else will. When a person in an apparently official capacity expresses disdain or disapproval for the option she seeks to exercise, this may discourage the minor from seeking other avenues to access the legal system, for fear of being looked down upon or simply because she may think that all county officials will have the same reaction.

c. Attorney Referrals

About a quarter of responses either told the caller that this was a legal question they were not allowed to answer or told her to call an attorney.⁹⁵ This includes people who said things like "I don't know, because that's a legal question" (without explicitly telling the caller to contact an attorney), explicitly saying that the caller would need an attorney, or saying that the judge would not grant judicial bypasses (clearly implying that the minor's next call should be to an attorney).⁹⁶

In some respects, this answer is less threatening to a girl's meaningful access to a judicial bypass than others. An attorney would be able to

94. District Clerk Offices, *supra* note 53, at § 2 (responding with a variation of "I don't know" were: Collin, Cottle, Delta, Edwards, Fayette, Foard, Garza, Gonzales, Grimes, Harrison, Hopkins, Jack, King, Knox, Lee, Madison, Motley, Robertson, Runnels, San Patricio, Sherman, Titus, Trinity, Uvalde, Wilbarger, and Zapata).

95. *Id.* (including: Andrews, Angelina, Archer, Atascosa, Bailey, Bastrop, Brazoria, Brewster, Ellis, Erath, Falls, Fannin, Fisher, Floyd, Galveston, Gillespie, Grayson, Howard, Hunt, Jeff Davis, Jim Hogg, Johnson, Kent, Kerr, La Salle, Lampasas, Liberty, Limestone, Lipscomb, Live Oak, Maverick, McCulloch, Medina, Mills, Morris, Nacogdoches, Newton, Nolan, Ochiltree, Orange, Palo Pinto, Parker, Polk, Red River, Reeves, Rockwall, Rusk, Sabine, San Augustine, San Jacinto, San Saba, Scurry, Shelby, Starr, Tarrant, Travis, Van Zandt, Wheeler, Wichita, Williamson, and Wood).

96. *See id.* at § 3.

research the applicable law and help the minor through the proceedings, assuming an attorney will take the case. But because of the prohibitive expense of attorneys' fees, a response by the clerk recommending she contact an attorney would probably deter a girl with limited resources and transportation options. A girl may call a legal services hotline as an alternative, but restrictions on Legal Services Corporation funding sometimes do not allow them to handle such cases. If the district clerk had followed "see an attorney" with the information that a girl could have one appointed to her for free, this deterrent effect would be largely mitigated. But, when asked, almost forty percent of counties did not know that an attorney would be provided for the girl, much less volunteer the information.⁹⁷

d. Referrals to Another Local Government Office

Fourteen percent of responses referred the caller to another local government office.⁹⁸ Most often these statements recommended contacting a judge, the judge's office or secretary, or the county attorney.⁹⁹ In some cases, it was unclear whether many of these responses meant that the clerk did not handle them and the other office had an affirmative responsibility, or if the person just had no idea and thought the other office might be of assistance.¹⁰⁰

In counties such as Cameron, the county clerk handles all bypass procedures because of the office's physical location in the courthouse.¹⁰¹ In a county like Cameron (where, interestingly, the clerk would not provide information without the minor coming to the office), a referral to the county clerk would be a meaningful way to obtain a bypass. Many others, what seemed like the vast majority, were simply guessing.¹⁰² It seems

97. *Id.* at § 4.

98. *Id.* (including: Aransas (county judge's office), Armstrong (judge), Brooks (judge), Camp (county attorney), Carson (judge's office), Coke (judge's office), Collingsworth (county judge), Colorado (county judge), Comanche (county judge's office), Crockett (district judge), Dallam (judge), Dallas (family court office), Duval (judge's office), Eastland (county judge), Hall (judge), Hardeman (district judge's secretary), Henderson (justice of the peace with implication that district judge refused to sign them but justice of the peace might), Hudspeth (justice of the peace), Hutchinson (judge's office), Jasper (judge's office), Jim Wells (judge's office), Kinney (county judge's office), Lamar (county attorney), Lamb (judge), Lavaca (county judge's office), Mason (county judge), Menard (district judge), Panola (judge), Presidio (judge's office), Somervell (judge's office), Sterling (district judge), Upshur (judge's office), Upton (judge's office), Winkler (district court), Wise (county judge's office), and Zavala (district judge's office)).

99. District Clerk Offices, *supra* note 53, at § 2.

100. *Id.*

101. *Id.*

102. *Id.* at § 4.

highly unlikely that a judge's secretary or the judge himself is truly responsible for handling these procedures and paperwork.¹⁰³ Alternate offices to which clerk's offices referred callers invariably could not provide information on bypass proceedings.¹⁰⁴ Further, it is highly unlikely that a minor seeking an abortion would feel comfortable calling a judge's direct line, even if directed there.

e. Clinic Referrals

Two percent of the responses referred the caller to an abortion clinic.¹⁰⁵ A study in Pennsylvania determined that referrals to abortion clinics generally yielded meaningful access to bypass proceedings.¹⁰⁶ Most often if a girl gets confirmation from the clerk's office that a bypass is available and she is told that the clinic will know what to do, she can obtain help at the clinic.¹⁰⁷ These clinics must be aware of the laws for their own legal responsibility, and may help a minor contact an organization like Jane's Due Process.¹⁰⁸ Although girls referred to a clinic may eventually have meaningful access to bypass procedures, the mandated responsibility lies with the state government. Texas rules charge clerks with this duty,¹⁰⁹ and clinics can only help where clerks, ignorant about judicial bypasses, refer callers to them. Additionally, ninety - three percent of counties in Texas have no abortion provider,¹¹⁰ and a girl might inadvertently call (or be purposefully referred to) an anti-choice "clinic."¹¹¹

103. TEX. PARENTAL NOTIFICATION R. § 1.7 (2000) (requiring the clerk's office to provide application forms for judicial bypass).

104. District Clerk Offices, *supra* note 53, at § 4.

105. *Id.* (including Frio, McLennan, Midland, Montgomery, and Walker).

106. Silverstein, *supra* note 72, at 84.

107. *See id.*

108. *See* ANNUAL REPORT *supra* note 9, at 2 (stating Jane's Due Process will help a girl through a judicial bypass).

109. TEX. PARENTAL NOTIFICATION R. § 1.7 (2000).

110. NARAL, PRO-CHOICE AMERICA, WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE UNITED STATES, TEXAS, http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/state-profiles/texas.html (2006).

111. *See* J.A. Mertus, *Fake Abortion Clinics: The Threat to Reproductive Self-Determination*, 16 WOMEN & HEALTH 95 (1990). *See* PLANNED PARENTHOOD FED'N OF AM., ANTI-ABORTION COUNSELING CENTERS, *available at* <http://members.aol.com/femnet/aborfakes.htm> (last visited Sept. 15, 2006) for a description of the tactics used by anti-choice "clinics" and the threat they pose to women.

f. “We Don’t (or Can’t) Do That”

Four percent of responses indicated that they would not or could not help a minor obtain a judicial bypass for various reasons.¹¹² Some seemed not to know these proceedings existed,¹¹³ while others indicated that their particular county was unwilling or unequipped to handle them.¹¹⁴

The response from Hansford County indicated the district judge “will not sign an order like that,” that the county judge was not empowered to, and that the paperwork could be picked up in their office and taken elsewhere.¹¹⁵ The person who answered the phone in Kimble County said that proceedings could not take place in their county because they have no court reporter and the statute requires a transcript be made of the proceedings.¹¹⁶ Martin County said their judges would not sign the paperwork.¹¹⁷ Mitchell County erroneously stated that the matters were not handled by district courts, only by county courts.¹¹⁸ Yoakum County answered that their judge was out of Terry County, and as far as she knew, they could not handle this issue.¹¹⁹ The response from Stephens County was simply “She can’t!”¹²⁰

The most memorable response came from Donley County. In response to the caller’s question, the clerk asked, “Is this for real? . . . Well, *supposedly* you can file a petition to the court and go through the process. We haven’t ever done it since it’s been in law, but if you wish to do that then. . . .”¹²¹ The clear implication was that they would not do it in their county,¹²² even though technically they had the legal responsibility to do so.¹²³

For a girl unaware of the open venue law, or unable to take advantage of it because of limited resources, lack of access to transportation or an inability to travel without attracting notice from parents, access to judicial bypass proceedings would effectively be cut off.

112. District Clerk Offices, *supra* note 53, at § 2.

113. *Id.* at § 4 (indicating an unawareness of the capability of the court to have judicial bypass proceedings to determine the need for parental involvement).

114. *Id.*

115. *Id.*

116. *Id.*

117. District Clerk Office, *supra* note 53, at § 4.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. District Clerk Offices, *supra* note 53, at § 4.

123. TEX. FAM. CODE ANN. § 33.003(a)-(n) (Vernon 2002 & Supp. 2005–2006).

g. Refusal

Four counties simply refused to provide any information.¹²⁴ An employee in Bowie County replied, “That is not anything that we can advise you on, legally or anything at all. We just can’t advise you on that.”¹²⁵ Guadalupe County’s response was, “It’s up to the judge, is all I can say.”¹²⁶ Cameron County said that the caller must come into their office for information.¹²⁷ The woman from Smith County said, “I could not tell you that.”¹²⁸ The clerk’s office in Tom Green County told the caller “that [it was] a legal matter that [could] be brought in district or county court” and indicated that the conversation was over at that point.¹²⁹ None of these offices demonstrated assistance to further access to the judicial bypass proceedings.

h. Referrals to Other Counties

Three percent of responses recommended that the caller contact an office in another county.¹³⁰ Coleman County said that they were a small county and that the caller would probably want to go to a larger county.¹³¹ Crosby County said that they are a small county where everyone knows each other, and that Lubbock would be a better option.¹³² Glasscock County indicated that they had never handled such a case, recommending the caller speak to Midland or Howard County and that she herself would need to call them for information.¹³³ Goliad County mentioned open venue and strongly suggested going to Victoria County — where an attorney might be appointed for the unborn child, indicating further that their county was not a good choice.¹³⁴ Hartley County recommended going to a larger county.¹³⁵ Loving County responded, “Lady, I don’t have the foggiest idea,” and told the caller to call Austin County.¹³⁶ McMullen County said that they could not hold the proceedings because they have no private area but recommended the caller con-

124. District Clerk Offices, *supra* note 53, at § 2.

125. *Id.*

126. *Id.* at § 4.

127. *Id.*

128. *Id.*

129. District Clerk Offices, *supra* note 53, at § 4.

130. *Id.* at § 2.

131. *Id.* at § 4.

132. *Id.*

133. *Id.*

134. District Clerk Offices, *supra* note 53, at § 4.

135. *Id.*

136. *Id.*

tact Live Oak County.¹³⁷ Refugio County seemed to have a policy of referring girls to Victoria County,¹³⁸ but the clerk in Victoria did not to know how to answer the question either.¹³⁹

These responses were separated from those simply saying that their county did not handle them, because these responses did not deny their county could do them, just recommended that other counties would be better equipped to handle bypass proceedings. Implicit in each of the other-county responses was a suggestion of open venue. As a result, such responses have a better chance of leading to access to bypass proceedings.

3. Our Survey Results Compared to Other Survey Results

The survey results obtained in 2006 are largely consistent with those of an April 2005 study conducted by Jane's Due Process. The April 2005 survey polled sixty-eight counties, both district and county clerks.¹⁴⁰ In that survey, fifty-eight percent of the answers received were "I don't know."¹⁴¹ Only twenty percent acknowledged responsibility and could provide information as to whether the judge would provide the minor an attorney and how long the proceedings last.¹⁴² Approximately nine percent refused to provide any information.¹⁴³

The higher number of "acknowledged responsibility" answers in the most recent survey of the district clerks office resulted from a more relaxed standard.¹⁴⁴ The 2006 survey assumed that, even if the clerk provided inaccurate information over the phone, the office acknowledged its responsibility even without knowledge of the relevant laws. This survey more accurately reflects what occurs across Texas because more counties were contacted, and callers were more persistent in contacting a person in each office. Another possible factor accounting for any minor differences in the results is the 2005 survey polled both district and county clerk offices, while the 2006 survey focused entirely on the district clerks' offices.

137. *Id.*

138. *Id.*

139. District Clerk Offices, *supra* note 53, at § 4.

140. Telephone Interview by Jane's Due Process of Several County and Dist. Clerk Offices, in *Tex. (Spring 2005) [hereinafter Jane's Interviews]* (on file with *The Scholar: St. Mary's Law Review on Minority Issues*).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at § 1.

Overall, the pictures painted by these surveys are consistent with Melissa Jacobs's 2003 study.¹⁴⁵ A comparison of these studies suggests that access through county officials has not improved over time, despite increased media attention, the passage of the consent requirement, or the introduction of Texas House Bill 1212.

C. Open Venue Is Necessary to Mitigate the Constitutional and Practical Problems Presented by Ill-Prepared County Officials

Empirical data indicates that practical access to a judicial bypass proceeding is limited even without restrictive venue laws.¹⁴⁶ The open venue law is critical for those girls who live in counties whose officials are not fulfilling their statutory duties. The surveys of Texas counties make clear the fact that counties are not prepared to handle a minor's questions regarding judicial bypass.¹⁴⁷ In order for judicial bypasses to be a reality in the majority of Texas counties, prospective applicants must have the option to move freely among Texas's counties to seek assistance.

Removing open venue would arguably render the law unconstitutional in practice. The state is not required to remove obstacles to obtaining an abortion not of its own creation,¹⁴⁸ but the behavior of district and county clerks is state action. The failure to adequately train employees in district and county clerks' offices to handle judicial bypasses probably does not rise to the level of a constitutional violation. But restricting minors to offices that repeatedly offer no real access to bypass proceedings prevents access to bypasses altogether—a result which violates both the spirit and the letter of *Bellotti*.¹⁴⁹ This is especially dangerous because not only will girls be unable to access their right to seek a bypass, they will not even know it exists. Girls who have no idea they have such a right will have no way of seeking reform through normal political channels or litigation.

145. See generally Jacobs, *supra* note 61; District Clerk Offices, *supra* note 53, at § 4; Jane's Interviews, *supra* note 140.

146. See *id.*

147. See *id.*

148. See *Rust v. Sullivan*, 500 U.S. 173 (1991) (finding that a pregnant woman has the right to be in the same position she would have been in had the government not involved itself in the abortion decision, but also reasoning that the government need not remove obstacles not of its own creation).

149. *Bellotti v. Baird*, 443 U.S. 622 (1979).

V. OPEN VENUE IS CRITICAL EVEN WITH ACCESS AVAILABLE THROUGH LOCAL OFFICIALS

Aside from maintaining actual access to bypasses, Texas's open venue law provides as near a "confidentiality guarantee,"¹⁵⁰ as a state can offer. Even minors living in counties adequately staffed with knowledgeable officials may not be able to visit their local courthouse because a neighbor or relative works there. In order to preserve maximum confidentiality, girls should have maximum mobility to choose where to exercise their right to seek a bypass hearing.

VI. CONCLUSION

Proponents of legislation such as Texas House Bill No. 1212 have made it very clear that their goal is to fight abortion. The elimination of open venue is certainly one way of cutting down on the number of abortions performed, but it would do so at the cost of the constitutional rights of Texas's minors, and it would arbitrarily allocate this burden on those minors who have the misfortune of living in counties where officials are unprepared or unwilling to follow the law. Although Texas has a long way to go before local practice lives up to the standards set by the Texas Parental Notification Rules, the Parental Rules provide a workable way to protect the rights of both minors and parents. Removing open venue would render the Parental Rules unconstitutional in practice and questionably unconstitutional on the page.

150. *Id.* at 644–46 (quoting the third prong of the test determining the confidentiality of a regulation providing a minor access to a judicial bypass of parental consent).