

# An Anthropological Meditation on *Ex Parte Anonymous*—A Judicial Bypass Procedure for an Adolescent's Abortion

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## INTRODUCTION

It is easy to ignore *Ex parte Anonymous*.<sup>1</sup> It is simple to dismiss it as an inconsequential decision, perfunctorily handed down by the Alabama Supreme Court, about matters that fail to rise to any level of jurisprudential importance. The decision involves no questions of constitutional interpretation, no issues of international import, no matters of obvious historical significance. Instead, the facts of the case might concern the stuff of prime-time television melodrama: a teenager—desperately hiding her pregnancy from her parents—attempts to get an abortion before it is too late. *Ex parte Anonymous* hardly makes a ripple in juridical waters.

However, this Essay does not find *Ex parte Anonymous* so easy to overlook. In fact, this Essay argues that *Ex parte Anonymous* reveals fascinating unspoken assumptions about gender, pregnancy, bodies, and the law. Within the decision lies an entire ontology of Truth and un-Truth,<sup>2</sup> Speech and Text.<sup>3</sup> In fact, it is the banality of the decision, the perfunctory

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1. 812 So. 2d 1234 (Ala. 2001).

2. I use "Truth" to refer to that concept problematized by postmodernist thought. Postmodernism argues that, in contrast to Enlightenment philosophy, there is no one Truth capable of being approached through rational, "scientific" inquiry; rather, there are many relative truths. Further, the belief in Truth tends to silence the truths of the disempowered; these lesser truths are banished outside of the realm of Truth to that of un-Truth. See generally JANE FLAX, THINKING FRAGMENTS: PSYCHOANALYSIS, FEMINISM, AND POSTMODERNISM IN THE CONTEMPORARY WEST (1990).

3. I use "Speech" to refer to language that has been performed vocally and "Text" to refer to language that has been written or inscribed in some way. I am indebted to deconstructionist philosophy for problematizing language and, consequently, for bringing to the fore "Speech" and "Text" as objects

nature in which it was rendered, and its failure to acquire significance (outside the personal, human tragedy that it adjudicates) that makes it an ideal candidate for the legal anthropological analysis in which this Essay engages.

A caveat: this Essay is not traditional legal anthropology; that is, it is not an ethnography that analyzes the rules, codes, and procedures of a (typically non-Western) legal system. Rather, this Essay joins the relatively new branch of legal anthropology that analyzes the cultural assumptions underlying legal discourse and the law's effect on culture and society.<sup>4</sup> As such, a fundamental assumption underlying the present analysis is that law and culture exist in a dialectical relationship. That is, the culture of a place profoundly affects the law that is legislated, adjudicated, or otherwise articulated there. Likewise, the law that is enacted profoundly affects the culture of the place in which it acts. The dialectical nature of law and culture produces a culturally inflected law. Of course, legislators and jurists must still attest to the objective, rational nature of their endeavor; indeed, to be "legal" is to be (at least ostensibly) objective, rational, staid, and universal. Yet, beneath the professed universal nature of the law's claims are the particularities and relativities of culture—all revealed when a critical, anthropological eye investigates the law.

This is to say that an anthropological analysis of a legal opinion will often reveal cultural assumptions the judge has taken as "fact." Accordingly, an anthropological analysis of abortion law generally—and of *Ex parte Anonymous* specifically—reveals cultural assumptions about gender, pregnancy, sex, and emotion. Though a blip on the radar screen of jurisprudence, *Ex parte Anonymous* provided a forum for the justices to wax philosophically about the difficulty of their task at hand—that is, to review the trial court's record. What results is rich material that, when scrutinized closely, says much about implicit understandings of Truth and un-Truth, Speech and Text.

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of study. See generally JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., Johns Hopkins Univ. Press 1974) (1967).

4. For exceptional examples of this new school of legal anthropology, see VINCENT CRAPANZANO, *SERVING THE WORD: LITERALISM IN AMERICA FROM THE PULPIT TO THE BENCH* (2000) (juxtaposing Christian fundamentalism with strict constructionism in U.S. constitutional practice in order to analyze shared assumptions about the relationship between the "signifier" (i.e., the word) and the "signified" (i.e., the object or concept that the signifier sought to represent); Nicholas P. De Genova, *Migrant "Illegality" and Deportability in Everyday Life*, 31 ANN. REV. ANTHROPOLOGY 419 (2002) (arguing that U.S. immigration law and the "spectacle" of the border patrol between the United States and Mexico produces "Mexican" as a distinctly subjugated and exploitable racial group).

## I

## THE CONSTITUTIONALITY OF PARENTAL CONSENT LAWS AND JUDICIAL BYPASS PROCEEDINGS

Popular understanding holds that a woman's constitutional right to abortion comes from *Roe v. Wade*.<sup>5</sup> However, the Court's decision in *Planned Parenthood v. Casey*<sup>6</sup>—decided thirteen years after *Roe*—rearticulated the right to abortion so substantially that *Casey* might be seen as the decision that, at present, provides the right to abortion. While *Casey* reaffirmed *Roe*'s holding that a right to elective abortion can be located in the Ninth Amendment's right to privacy,<sup>7</sup> it rejected *Roe*'s trimester framework<sup>8</sup> and replaced it with one based on fetal viability—that is, based on “the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.”<sup>9</sup>

The *Casey* Court applied an “undue burden analysis” in seeking to “protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life.”<sup>10</sup> In “reject[ing] the rigid trimester framework of *Roe v. Wade*” the Court condoned state laws that encumber a woman's right to abortion as long as those laws do not impose an “undue burden” on the woman by “plac[ing] a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”<sup>11</sup>

While *Casey*'s holding undoubtedly applied to adult women, the question of whether it applied to women who had not yet reached the age of majority remained. After *Roe*, many states had passed laws requiring that a woman under the age of eighteen either notify or obtain the consent of one or both of her parents before she could obtain an abortion. Earlier

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5. 410 U.S. 113 (1973).

6. 505 U.S. 833 (1992).

7. *Id.* at 871 (“And we have concluded that the essential holding of *Roe* should be reaffirmed.”).

8. Under *Roe*, the determination of whether the right to an abortion was constitutionally protected depended on the trimester during which the abortion was sought:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the [third trimester], the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

410 U.S. at 164-65.

9. *Casey*, 505 U.S. at 870.

10. *Id.* at 878.

11. *Id.*

Supreme Court decisions had upheld such laws as long as the state allowed the minor an avenue through which she could avoid the requirement of acquiring parental consent or notification. This avenue usually took the form of a "judicial bypass" procedure whereby the minor could demonstrate her maturity to a court, thereby establishing the expendable and inessential nature of her parents' knowledge of her abortion decision. *Casey's* rearticulation of the abortion right raised the possibility that states' requirements of parental notification and consent were unconstitutional insofar as they imposed an "undue burden" on an adolescent woman's right to abortion prior to viability. The *Casey* Court, however, answered this question in the negative, ruling that laws requiring parental consent or notification were indeed constitutional—but only if a judicial bypass procedure was available as an alternative to parental consent.<sup>12</sup> *Casey* thus reaffirmed *Bellotti v. Baird*,<sup>13</sup> in which the Court held that, because an unplanned and unexpected pregnancy is one of those "few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible,"<sup>14</sup> the minor's parent should not be allowed an absolute veto right *if the minor is mature enough to make the abortion decision on her own*.<sup>15</sup> Hence, although the state might reasonably afford parents deference in most other aspects of a minor's life, "the State may not impose a blanket provision . . . requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy."<sup>16</sup>

Accordingly, all states that require parental consent prior to an adolescent's abortion must also provide for a judicial bypass proceeding:

A pregnant minor is entitled in such a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents' wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.<sup>17</sup>

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12. *Id.* at 899. While the Court has held that a state must provide for a judicial bypass procedure when it requires parental *consent* to an adolescent's abortion (because the state "does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto" over a woman's abortion right, *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)), the Court has not yet decided whether the same holds for parental *notification* laws. See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510 (1990) ("[A]lthough our cases have required judicial bypass procedures for parental consent statutes, we have not decided whether parental notice statutes must contain such procedures. We leave the question open.") (citations omitted)).

13. 443 U.S. 622 (1979).

14. *Id.* at 642.

15. *Id.*

16. *Id.* at 643 (quoting *Danforth*, 428 U.S. at 74 (1976)).

17. *Id.* at 643-44.

The judicial bypass proceeding must also (a) ensure that the minor's identity remain unknown and (b) be held expeditiously enough so as not to constitute, in fact, a veto on the minor's right to abortion.<sup>18</sup>

Currently, forty-four states have laws on the books that require parental consent or notification prior to an adolescent woman's abortion. Thirty-five states actually enforce those laws.<sup>19</sup> Alabama is one of those states. However, Alabama is anomalous insofar as it is a state in which the judicial bypass proceeding results in a denial of the waiver to the parental-consent requirement with disturbing frequency. Young women who are denied the judicial waiver generally appeal the trial court's decision to the Court of Appeals and then to the Alabama Supreme Court, which often affirms the trial court's denial of the waiver.<sup>20</sup>

The higher rate of denials in Alabama relative to other states may indicate that pregnant minors seeking abortions in Alabama are less mature than minors in other states, or it may indicate that abortions are less frequently in the best interests of minors in Alabama than they are for minors in other states. Or, more likely, the high rate of waiver denials may reveal an Alabama judiciary more opposed to abortion (generally, or for adolescents specifically) than judiciaries in other states. In the next Section, I examine *Ex parte Anonymous*, a published judicial bypass hearing appeal in Alabama, in order to reveal an ontology of Truth and un-Truth, Speech and Text in Alabama.<sup>21</sup>

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18. *Id.*

19. See Planned Parenthood, *Laws Requiring Parental Consent or Notification for Minors' Abortions*, <http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/abortion/fact-parental-consent.xml>.

20. See Stephen P. Rosenberg, Note, *Splitting the Baby: When Can a Pregnant Minor Obtain an Abortion Without Parental Consent?* *The Ex parte Anonymous Cases (Alabama 2001)*, 34 CONN. L. REV. 1109, 1133 (2002) (noting that "recent Alabama opinions have given the trial court an easy way to deny a judicial bypass without fear of reversal").

21. A note on my political position: Since I was an adolescent, I have been staunchly opposed to parental notification and consent laws for adolescent abortions. It is my stance that such laws represent either an indirect mechanism by which anti-abortion jurists and legislators can burden a young woman's abortion right or an ill-advised attempt to foster a particular relationship between an adolescent and her parents—that is, to create a "strong" family unit. It is my position that a young woman's unplanned pregnancy—i.e., when she is in crisis—is an abysmal time to coerce the creation of an idealized nuclear family. Frequently, the young woman has extremely convincing reasons for not disclosing a pregnancy; for instance, her parents may be abusive or may have threatened violence in the past in the event of a pregnancy. Additionally, "strong" parent-child relationships exist in many varieties; in a strong relationship, a child may not confide in her parents—even about extremely important decisions like the termination of an unwanted pregnancy. Also, there is a compelling argument that adolescents have an important interest in self-representation; even a minor person should have the freedom to present herself to those with whom she interacts as she so desires. If she does not want having had an abortion to form part of the identity others attribute to her, she should have that agency.

For cogent arguments against parental notification and consent laws, see generally 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); Jamin B. Raskin, *The Paradox of Judicial Bypass Proceedings*, 10 AM. U. J. GENDER SOC. POL'Y & L. 281 (2002); Carol

## II

## EX PARTE ANONYMOUS

On August 16, 2001, the Supreme Court of Alabama issued an opinion regarding a petition for review of a judgment made in a trial court some three and a half weeks before. The litigation had begun when a seventeen-year-old "unemancipated minor" filed a petition "seeking a waiver of parental consent for an abortion."<sup>22</sup> At the time of the denial of her petition on July 20, 2001, she was six weeks pregnant and confident that she did not want to carry her pregnancy to term. The trial court record—quoted in both the court of appeals decision and the supreme court decision—indicated that she was a senior in high school with a 3.0 GPA who played in her high-school band. Moreover, she had been accepted to a college and was applying for financial aid. She had also been saving money from her weekend job to help pay tuition.<sup>23</sup>

The young woman's legal guardian was her grandmother. The petitioner testified that she did not want to inform her grandmother of her pregnancy because the latter was "religious" and "opposed to abortion."<sup>24</sup>

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Sanger, *Regulating Teenage Abortion in the United States: Politics and Policy*, 18 INT'L J. OF L., POL'Y AND THE FAM. 305 (2004).

22. *Ex parte Anonymous*, 812 So. 2d 1234, 1235 (Ala. 2001) (citation omitted). Why do I turn to a state court proceeding as an entrée into an exploration of legal discourse? Carlo Ginzburg demonstrates that one need not conduct a "scientific" sampling of cases, or find one that is sufficiently "representative," in order to draw valid conclusions about "macro" issues. See CARLO GINZBURG, *CLUES, MYTHS, AND THE HISTORICAL METHOD* 164 (John & Anne C. Tedeschi trans., The Johns Hopkins University Press 1992) (1986) ("A close reading of a relatively small number of texts, related to a possibly circumscribed belief, can be more rewarding than the massive accumulation of repetitive evidence"). While the "macro" issue that Ginzburg sought to theorize with the extraordinary case of Menocchio was the cosmology of the peasant substratum, the "macro" issue that I seek to theorize here is the law and legal discourse.

On the extraordinariness of *Ex parte Anonymous*: The records and decisions of judicial bypass procedures are not normally published because the proceedings are confidential in order to protect the identity of the petitioner. The general public has access to what was said during bypass proceedings only through the published appeals of trial-court hearings. However, access to bypass proceedings via this indirect avenue tends to be limited, primarily because waivers of notification and consent requirements are usually granted summarily. If a pregnant minor has the wherewithal to obey procedure, file a petition, and present herself in court, courts in most states appear to afford her a presumption of maturity and grant the petition for a waiver. In fact, in the past, Alabama used an adolescent's ability to present herself in front of a judge for a bypass proceeding as an indication of maturity. See, e.g., *Ex parte Anonymous*, 595 So. 2d 497, 499 (Ala. 1992) (citing *In re Anonymous*, 515 So. 2d 1254 (Ala. Civ. App. 1989)). Hence, there is a dearth of published judicial bypass decision appeals—except in Alabama, where a large number of petitions are denied in the trial courts. (This might indicate the Alabama courts operate on a presumption of *immaturity* when a female finds herself pregnant, underage, and desiring an abortion without parental consent.)

The particular case I discuss was remarkable in that the high court did not affirm the lower court decision without comment (as it does quite frequently); rather, it spoke at length about "the problems of text"—which I will discuss at length in Part VI. Thus, *Ex parte Anonymous* represents a fascinating articulation of judicial reasoning and an "extraordinary" act of self-reflection on the part of a jurist who was not legally bound to reflect.

23. *Ex parte Anonymous*, 812 So. 2d at 1235.

24. *Id.*

Although the petitioner could attempt to obtain consent from her mother (with whom she had occasional contact), she chose not to consult with her for similar reasons.<sup>25</sup>

Though the minor felt that she could not talk to either her legal guardian or her biological parent about her pregnancy, she had, in fact, consulted with several others about her choices:

(1) She spoke with "the baby's father" and they jointly considered their options. She and her eighteen-year-old boyfriend had concluded that "they [were] not ready for a child and that they [were] financially unable to care for a baby."<sup>26</sup> She also testified that she did not want to place the baby for adoption because she believed that pursuing that alternative would be more emotionally trying than an abortion.<sup>27</sup>

(2) She spoke with her twenty-year-old sister, a student in college, who advised her to make sure that she was "all right" with her decision to abort her pregnancy.<sup>28</sup>

(3) She spoke with her thirty-seven-year-old godmother, who also testified in court on the petitioner's behalf. The godmother, a mother of two, gave evidence that she would go to the clinic with the young woman for the abortion procedure and would care for her afterwards. The godmother also testified that, in her opinion, the petitioner was mature and had considered all of her options before petitioning the court for a parental consent waiver.<sup>29</sup>

(4) She spoke with a doctor and a counselor at the clinic from which she wished to obtain her abortion. Due to these conversations, she was able to describe the abortion procedure.<sup>30</sup> Furthermore, she had been apprised of the risks of the procedure and had been informed that the abortion would probably not cause any difficulties.<sup>31</sup> Moreover, the young woman had discussed the psychological implications of abortion with a counselor and had read an article entitled "How Women Cope After Their Abortion: Implications for Pre-Abortion Counseling."<sup>32</sup>

Despite this compelling evidence of the minor's maturity, the trial court denied the petition for waiver "based on this court's review of the minor's composure, analytic ability, appearance, tone of voice, expressions, and overall demeanor."<sup>33</sup> The trial court noted that "the answers given by the minor appeared to be [given] in an almost rehearsed

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25. *Id.*

26. *Id.*

27. *Id.* at 1235-36.

28. *Id.* at 1236.

29. *Id.* at 1236.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

manner . . . [without] any expression of emotion.”<sup>34</sup> Realizing that a reviewing court might be skeptical of its decision due to the ostensibly solid case for maturity presented by the young woman, the trial court forewarned any appellate judge that the written record may be deceiving:

The court recognizes that the words on the transcript of this case appear that the minor said all the correct words and was very well informed concerning her desire to obtain the Parental Consent Waiver. However, this court has found that the minor’s testimony was not believable and/or credible. . . . [T]he testimony of the minor and the godmother appeared to be rehearsed and . . . neither of the two individuals showed any emotion concerning the very serious request that they were making in this proceeding.<sup>35</sup>

Additionally, the trial court cautioned the reviewing judge that it would be easy to be seduced by the seemingly unequivocal maturity that the minor presented via the record:

The fact that the minor child has applied for college, has answered the questions asked and has presented documents to this court does not prove to this court that she is mature and well informed enough to make the abortion decision on her own and that the abortion would be in the best interest of the minor. *This court makes this conclusion, not from the plain words used by the minor and/or the documents presented alone; this court makes this decision [from] inferences from the minor’s composure, analytic ability, appearance, thoughtfulness, tone of voice, expressions and her ability to articulate her reasons and conclusions.*<sup>36</sup>

The Supreme Court of Alabama declined to reverse the lower court’s ruling—citing the *ore tenus* rule of “considerable deference” to the trial judge’s conclusions. Accordingly, the Alabama Supreme Court declined to review the lower court’s factual findings *de novo* and accepted, without exception, “the findings of the trial court based upon its assessment of the minor’s demeanor.”<sup>37</sup> Furthermore, the Alabama Supreme Court held that, though the trial transcript presented a compelling case for maturity, it would be unwise to disturb the holding of the trial judge, who had the privilege to receive the testimony orally. The Court concluded: “The trial court’s conclusions, although subjective, were based on its having personally viewed the witnesses as they testified and cannot be questioned on appeal, where we have before us *only a cold, printed record.*”<sup>38</sup>

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34. *Id.*

35. *Id.* at 1238.

36. *Id.* (emphasis added).

37. *Id.* at 1237.

38. *Id.* at 1238 (emphasis added).



## III

THE LIMINALITY<sup>39</sup> OF JUDICIAL BYPASS PROCEDURES

Judicial bypass hearings are a strange incarnation of American judicial procedure. Adolescents attempting to avoid the requirement of obtaining parental consent for their abortion are usually advised by abortion providers to speak with an intake officer at the local juvenile or family court. Generally, the intake officer assigns the petitioning young woman an attorney. After meeting her counsel, the young woman appears before a judge in a confidential hearing. After the hearing, the judge issues an order either granting or denying the waiver request. If the waiver is granted, the young woman can obtain an abortion without parental consent. If denied, she can appeal the decision.<sup>40</sup> On the surface the proceedings are unexceptional: a complainant or petitioner presents her case to the judge, who as fact finder hears the testimony that she and possibly other witnesses present and then determines as a factual matter whether the petitioner has established her maturity.

However, judicial bypass hearings are anomalous in several ways. While the petitioning young woman may have an attorney represent her, this attorney does not perform the usual functions of an attorney—for instance, the attorney does not present the case via opening and closing statement, cross-examine witnesses testifying for the adverse party, object to questions on the client's behalf, or speak on behalf of the client. This is, in part, because there is no opposing counsel. Nor is there an attorney present to represent the State.<sup>41</sup> Because there is no opposing counsel to cross-examine the petitioning young woman, the presiding judge must directly pose questions to the young woman whose maturity is on trial. Hence, to a certain extent, the judicial bypass procedure appears rather non-American—or at least non-adversarial. With the judge on high directly questioning the witness, it is not difficult to see the resemblance to

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39. "Liminality" is a term that anthropologist Victor Turner introduced. See V. TURNER, *Betwixt and Between: The Liminal Period in Rites de Passage*, in *THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL* 93 (1967). Essentially, "liminality" means an in-between kind of space, a gray area in which one is between recognized stages. For example, adolescence might be described as a liminal period between childhood and adulthood. I use "liminality" here to suggest that judicial bypass procedures reside somewhere between adversarial and inquisitorial proceedings.

40. See 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, 78-79 (2001).

41. Although no attorneys represent the State during judicial bypass procedures, Silverstein explains that two Alabama judges have begun the practice of appointing guardians ad litem for the petitioning young woman's fetus. See *id.* In the past, these guardians ad litem have asked the petitioning young women whether they are familiar with certain scriptures from the Bible, whether they believe that abortion is a sin, and whether they are prepared to "kill" their "baby." See *id.* at 81-82. This procedural innovation is disturbing for many reasons; most importantly, it introduces a religiously informed view of conception, agency, personhood, and "life" into a purportedly secular arena. Interestingly, Silverstein argues that the appointment of guardians to represent the interests of the fetus "transforms waiver hearings into adversarial proceedings." *Id.* at 70.

inquisitorial trials.<sup>42</sup> Indeed, the hallmark of inquisitorial judicial systems is that the state, as opposed to private actors, actively investigates the facts and manage the trial.<sup>43</sup>

In an essay titled "The Inquisitor as Anthropologist," historian Carlo Ginzburg explains how the power differential between an inquisitorial judge and a responding witness perverts the witness's testimony. Instead of producing a *dialogue* of question and response, the inquisitorial trial frequently reduces the witness's speech to a mere parroting of the judge's. As Ginzburg writes,

[t]his inequality in terms of power (real as well as symbolic) explains why the pressure exerted by inquisitors on the defendants in order to elicit the truth they were seeking was usually successful. These trials not only look repetitive but also *monologic* (to use a favorite Bakhtinian word), in the sense that the defendants' answers were quite often just an echo of the inquisitors' questions.<sup>44</sup>

Thus, the anthropologist seeking to analogize judicial bypass proceedings to inquisitorial trials should search for the mirrored speech of the judge in the speech of the minor witness. She should look for evidence of the gradual corruption of the minor's subjectivity. If the judge ultimately denied the minor's petition for waiver on the grounds that she did not prove her maturity, then are there signs of a reflection of the judge's perception in the minor's testimony? Did she begin with assertions of independence only to capitulate later, under the weight of inferences from the judge? When the judge questioned the unemotional delivery of her evidence, did she begin to demonstrate sentiment—albeit subconsciously?

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42. In fact, Alabama Judge W. Mark Anderson, author of the procedural innovation whereby a guardian ad litem is appointed to represent the unborn fetus, argues that such appointments save the judge from being "forced into the position of cross-examining the young women. [The judge], not wanting to take on the role of inquisitor, can thus leave the questioning to the guardian." *See id.* at 101.

43. See Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 193 (2004) (explaining that while "the government's role was traditionally constrained by the equality accorded the parties, by the jury trial, and, later, by defendants' constitutional rights" in the adversarial system, "[i]n the inquisitorial system, state actors traditionally dominated the proceedings, conducting the investigation and managing trial and sentencing."). Interestingly, Moohr argues that inquisitorial processes are an effective way to "achieve deterrence. One way of achieving deterrence is to punish harshly those offenders who are apprehended." *Id.* at 211. Insofar as judicial bypass proceedings resemble inquisitorial trials, one can extrapolate that such resemblance is intentional, as it dovetails nicely with anti-abortion proponents' desire to use the procedure as a vehicle for deterring teenage females from having sex and punishing them harshly for having had sex in the past. *See Sanger, supra* note 21, at 306 (arguing that "parental involvement statutes... are less concerned with developing sound or nuanced family policies" to improve the quality of teenage health or decision making than with "punishing girls for having sex").

44. *See* GINZBURG, *supra* note 22, at 160.

Compare the present case of *Ex parte Anonymous* with *In re Anonymous I*<sup>45</sup>—an analogous case that denied a parental notification waiver to a pregnant thirteen-year-old who appealed the decision all the way to the Supreme Court of Nebraska.<sup>46</sup> The trial court proceedings in *In re Petition* resemble an inquisitorial trial in that the Nebraska trial judge—and not counsel for an adverse party—directly questioned the petitioner when she took the witness stand:

- [COURT]: Have you discussed the procedure with any medical person?
- [MINOR]: Well, I went to Planned Parenthood and talked to them about it.
- [COURT]: All right. Did they discuss any medical risks that are involved?
- [MINOR]: No, but I got booklets on it and read about them.
- [COURT]: Okay. But Planned Parenthood didn't discuss it with you?
- [MINOR]: ([Minor] nods head in the affirmative.)
- [COUNSEL]: Your Honor? Did you speak with Sherry Ham?
- [MINOR]: Yeah.
- [COUNSEL]: Didn't she go through the procedure you are going to have and tell you what—the possibilities you might suffer?
- [MINOR]: Yeah.
- [COURT]: What do you understand are any risks that are involved?
- [MINOR]: Well, I hear you have bad cramps or you may get something up inside you that could cause risks.<sup>47</sup>

In the above excerpt, it is possible to detect a subtle corruption of the minor's testimony in the face of the questions of the court. Notice how, at one point, the petitioner's counsel attempts to wrest control of the petitioner's examination from the judge. The counsel, politely and with due deference to the judge, asks "Your Honor?," as if to regain control of the examination of the witness. Counsel manages to get two questions in before the judge interrupts to interrogate the witness directly, asking the

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45. 558 N.W.2d 784 (Neb. 1997).

46. *Id.* at 786. This case shows that there are usually very compelling and justifiable reasons why some minors choose not to inform their parents of an unplanned pregnancy. The petitioning minor in *In re Petition* testified that "[s]he has not discussed sexual matters with her parents and has not told them of her pregnancy. She testified that she feels pretty close to her mother, but she fights 'a lot' with her father. She said that on two separate occasions, her father threatened to kick her out of the house if she got pregnant at a young age. She takes these threats seriously and does not believe her father is merely trying to emphasize his concern or feelings about her becoming pregnant." *Id.*

47. *Id.* at 786-87.

young woman if she had already “discuss[ed] any medical risks” with the people at Planned Parenthood. She answers that she had not—although questions from her counsel soon thereafter reveal that the minor had indeed spoken with a woman named Sherry Ham who walked her through the procedure and explained the potential health consequences. It is not that the young woman misunderstood the judge’s initial question, as she confirms twice that she had not “discuss[ed] any medical risks” with the Planned Parenthood staff; rather, a more convincing interpretation is that the young woman did not understand what she spoke about with Sherry Ham as “risks.” Because the adolescent, initially, did not conceptualize “bad cramps” and the possibility that some fetal tissue might remain in the uterus post-abortion (“you may get something up inside you”) as a “risk” of the abortion, she responded to the judge’s question in the negative.<sup>48</sup> Accordingly, the counsel tried to reconcile the judge’s language of “risk” with the young woman’s understanding; instead of asking her if Sherry Ham discussed “risks” with her, she asked her if the minor spoke with Ham about “the possibilities you might suffer.” It appears that at the end of the exchange, the minor had been disciplined to speak in the language of “risk”—that is, to understand the possible consequences of the abortion as “risk.” She concludes, “Well, I hear you have bad cramps or you may get something up inside you that could cause risks.”<sup>49</sup>

However, with regard to *Ex parte Anonymous*, the anthropologist’s search for a monologue—that is, for the judge’s speech ventriloquized by the young woman—would be unfruitful due to one crucial fact: the judge

48. *Id.*

49. *Id.* (emphasis added). As for why the minor did not conceptualize cramps, the possibility of hemorrhaging, or even death as a “risk” of an abortion, I can only speculate. After having worked in an abortion clinic and having spoken with hundreds of women about their perceived choices with regard to their unwanted pregnancies, the most desperate do not consider carrying the pregnancy to term as an option. That is, there would be nothing worse than carrying the unwanted pregnancy to term—not even death. Hence, if “risk” is understood as relative to the alternatives, and there are no alternatives imagined, then the potentially life-endangering “possibilities [one] might suffer” during and after an abortion may not be understood as “risks.”

Rayna Rapp comes to a similar conclusion about the relativity of “risk”—for Rapp’s study, the risk of fetal abnormality as revealed by amniocentesis:

But the seeming objectivity of numbers is continually undermined by [individual women’s] subjective interpretation. From the patient’s point of view, any risk may feel like either 100 percent or zero, depending on prior experience. . . . As one savvy genetic counselor queried,

How do we convey a chromosome risk when a low-income pregnant Afro-Puerto Rican woman experiences a 100 percent chance of running out of food stamps this month, a 25 percent chance of having one son or brother die in street violence, and an 80 percent chance of getting evicted by the end of the year? A one-in-180 chance of having a child with a chromosome abnormality at age 35 is probably the best odds she’s facing.

RAYNA RAPP, *TESTING WOMEN, TESTING THE FETUS: THE SOCIAL IMPACT OF AMNIOCENTESIS IN AMERICA* 69 (2000). I cite this to argue that if a young woman has a 1-in-100 chance of cramping, a 1-in-500 chance of hemorrhaging, and 1-in-50,000 chance of dying from an abortion, but a 100% chance of reaping parental wrath if she informs her parents of her pregnancy, then the chance of cramping, hemorrhaging, and death may not feel like “risks” at all.

failed to ask the petitioner any questions, thereby denying the young woman the opportunity to ventriloquize his speech. In fact, a dissenting supreme court justice in *Ex parte Anonymous*, Justice Houston, criticized the lack of cross-examination, finding it difficult to comprehend that the “trial court asked the minor no questions, yet it found that ‘the minor’s testimony was not believable and/or credible.’”<sup>50</sup> In the absence of cross-examination, it appears that the record, indeed, presents a monologue. However, the case of *Ex parte Anonymous* differs crucially from the inquisitorial trials examined by Ginzburg because the record presents not a Ginzburgian monologue of the witness-qua-judge, but a “pure” monologue of the less powerful witness-qua-herself.

If, in fact, the record of *Ex parte Anonymous* presents a “pure” monologue of the young woman’s voice—that is, if it were a preserve of the young woman’s consciousness untainted by the consciousness of another more powerful subject (like the judge), then it would represent quite a feat. Insofar as the petitioning young woman is subject to the laws and ideology of a class of individuals to which she does not belong (that is, the class of powerful legislators and jurists in Alabama whose regulations have, very sensuously, affected her immediate life by forcing her to remain pregnant against her own desires), she could be considered a subaltern subject.<sup>51</sup> Moreover, Spivak explains that subaltern consciousness is elusive, subject as it is to the consciousness of the elite: “[subaltern consciousness] is never fully recoverable, . . . it is always askew from its received signifiers, indeed . . . it is effaced even as it is disclosed.”<sup>52</sup> Indeed, elsewhere, Spivak has reached the rather pessimistic conclusion that “[t]he subaltern cannot speak”<sup>53</sup> because they are muted by colonialism, post-colonialism, sexism, feminism, racism, and epistemic violence generally.<sup>54</sup> Nevertheless, the school of subaltern studies is dedicated to the task of locating subaltern consciousness and finding subaltern voices in the annals of history. Thus, the record of *Ex parte Anonymous* would be a miraculous anthropological find should it store a subaltern subject’s consciousness, voice, and speech.

50. *Ex parte Anonymous*, 812 So. 2d at 1239 (Houston, J., dissenting).

51. “Subaltern” refers to disempowered people. As Edward Said explains, “Its implied opposite is of course ‘dominant’ or ‘elite,’ that is, groups in power.” Edward W. Said, *Forward*, in *SELECTED SUBALTERN STUDIES*, at v (Ranjit Guha & Gayatri Chakravorty Spivak eds., 1988). Said explains that the word “subaltern” derives from Gramsci, who showed that

the essence of the historical is the long and extraordinarily varied socio-cultural interplay between ruler and ruled, between the elite, dominant, or hegemonic class and the subaltern and, as Gramsci calls it, the emergent class of the much greater mass of people ruled by coercive or sometimes mainly ideological domination from above.

*Id.* at vi.

52. Gayatri Chakravorty Spivak, *Subaltern Studies: Deconstructing Historiography*, in *SELECTED SUBALTERN STUDIES* 11 (eds. Ranjit Guha and Gayatri Chakravorty Spivak) (1988).

53. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* 271, 308 (Cary Nelson & Lawrence Grossberg eds., 1988).

54. *Id.* at 295.

Yet, it would be premature for the anthropologist looking upon the ostensible "pure" monologue of the petitioning young woman in *Ex parte Anonymous* to rejoice in celebration of having found an archive of a preserved subaltern voice—an archive of the voice of the disempowered. Although the young woman's testimony appears in a seemingly "pure" form, it is crucial to recognize that her voice remains mediated. Her testimony was delivered for the express purpose of convincing a judge that she was mature enough to decide to terminate her pregnancy without having to consult her parents or guardians. As both the trial judge and the justice writing the *per curiam* opinion for the supreme court noted, the minor had rehearsed her testimony—very, very well. She had, in fact, rehearsed her testimony to her detriment. It is unclear exactly who helped her prepare, but it is not illogical to presume that *someone* helped prepare her—going over the basic ground that she should cover; posing hypothetical questions to her that the judge might ask on the day of the hearing; ensuring that the delivery of her evidence was "credible." Hence, the minor's voice is not unmediated: It is mediated by the preparations of an unknown person who—in view of what he or she thought the law expected—attempted to ensure that the minor's case was convincing.<sup>55</sup>

Ginzburg explains that some texts are

intrinsically *dialogic*. The dialogic structure can be explicit, as in the series of questions and answers that punctuate either an inquisitorial trial or a transcript of the conversation between an anthropologist and his informant. But it can also be implicit, as in ethnographic field notes describing a ritual, a myth, or a tool.<sup>56</sup>

In the latter case, the ethnographic field notes contain an implicit dialogue between the anthropologist's culture and subjectivity, on one hand, and the cultural artifact that the anthropologist describes, on the other. In the case of the judicial bypass proceeding, implicit in the rehearsed testimony of the minor is a dialogue between the young woman—as she relates the quotidian facts of her life (her age and post-secondary-school plans) as well as the intensely personal details of her unexpected and unwanted pregnancy—and the person who coached her, who attempted to mold her speech into a claim cognizable by the law.

It is important to recognize that the young woman's pre-trial coaching (which, I argue, makes her speech implicitly dialogic) is not the only factor that mediates her voice. Rather, before we, as the general public, have access to the petitioning young woman's speech, it undergoes a triple

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55. As Guha argued in a different context, the search for the voice of the young woman in this case is "made all the more difficult by the mediation of the law. Each of the statements in this document is direct speech, but it is speech prompted by the requirements of an official" proceeding. Ranajit Guha, *Chandra's Death*, in *A SUBALTERN STUDIES READER* 34, 37 (Ranajit Guha ed., 1997).

56. GINZBURG, *supra* note 22, at 159.

mediation—first through out-of-court coaching or rehearsing, next through incomplete quotation in the trial court's decision, and finally through secondary citation in the state supreme court's decision. The quotations beg the question: what did the trial court believe important enough to include? Additionally, the minor's nonverbal testimony disappears entirely: the pauses that the minor invariably made while speaking, and perhaps her eyes' search for reassuring glances from her godmother or her wrinkled brows as she tried to remember the testimony that she had practiced the night before. All of this nonverbal speech disappears from the "cold, printed record." While the trial court cited the adolescent's words in concluding that she lacked emotion, those extra-lingual signs that others may reasonably believe could indicate emotion are not available to a reader who was not present with her in the courtroom.<sup>57</sup>

In sum, judicial bypass proceedings resemble inquisitorial trials insofar as the judge can directly examine and cross-examine the witness. Further, Ginzburg explains that the power differential between the inquisitorial judge and the witness tends to coerce the witness to ventriloquize the thoughts, beliefs, and speech of the judge, thereby forcing the witness to suppress her own speech and speak the judge's monologue. However, *Ex parte Anonymous* differs because the judge asked the witness no questions. Because the young woman was not given the opportunity to ventriloquize the judge's speech, her speech may consequently appear as a "pure" monologue of her own thoughts and beliefs. However, I argue that her speech is not a "pure" monologue, but rather an implicit dialogue between her thoughts and that of the person who rehearsed her prior to her bypass proceeding.

#### IV

##### THE METAPHYSICS OF "TRUTH"

###### A. *Truth and the Minor's Maturity*

In the Order denying the waiver of parental consent, the *Ex parte Anonymous* trial court did not simply state that the young woman failed to prove to the court that she had the requisite level of maturity to choose to terminate her pregnancy. Rather, the court concluded that the evidence the minor presented demonstrated that she was not, in fact, sufficiently mature enough to make the abortion decision without parental consent: "this

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57. The court reporter might have inserted "(unemotionally)" or "(in a rehearsed manner)" in front of the transcription of the witnesses' speech. However, when court reports use such explanatory parentheticals, they usually denote the presence of something—for instance, a passionate delivery, a sob, or even a pause. Only infrequently do they appear to be employed to denote what is perceived as the absence of emotion (perhaps because emotion is rather frequently absent from legal testimony in the first place).

court . . . made a legal determination that *the minor child was not mature* and well-informed enough to make the abortion decision on her own.”<sup>58</sup>

Compare this pronouncement of the minor’s immaturity with the holding of an analogous Nebraska Supreme Court case, *In re Petition of Anonymous*: “we . . . conclude that *the minor has failed to sustain her burden of proving by clear and convincing evidence that she is mature* [and that she does not have] a level of experience, perspective, or judgment *sufficient to allow this court to consider her mature within the meaning of the statute.*”<sup>59</sup> While the Nebraska court’s language appears to rule on the merits of the petitioner’s *case* for maturity, the Alabama court appears to rule on the *petitioner’s maturity*. The Alabama court, much more so than the Nebraska court, appears to be adjudicating the question of *the Truth* of the young woman—whether *she* is mature.

One could argue that the Alabama court was simply using a common legal metaphor in not bothering to differentiate between the legal standard and the Truth underlying it. One could dismiss it as a benign failure of these jurists to be precise with their language. And one would likely find many other examples of such imprecise language in all manner of judicial decisions. However, I would like to raise the possibility that this slippage of language reveals a notion—not consciously articulated, but present nevertheless—that there is indeed a unity between the legal standard and the Truth underlying it. Further, that the elision of the distinction between the legal standard and the Truth underlying it is so pervasive might not work in favor of comprehending it as an empty, though widespread, legal metaphor; rather, this ubiquity might serve to argue in favor of its cultural significance.

Consider Shahid Amin’s argument that “[j]udicial discourse hopes to establish by well-defined procedures the *only true* narrative of past events. A product of Reason, it fixes a single, definitive, verifiable and proven meaning to the ‘case’, and this meaning must hold good.”<sup>60</sup> If, as Amin asserts, “[j]udgment is a representation of what ‘really’ happened,”<sup>61</sup> the trial court in *Ex parte Anonymous* appears to be passing on the “single, definitive, verifiable and proven” truth of the young woman’s maturity. Because the trial judge in *Ex parte Anonymous* disbelieves the credibility of the young woman’s testimony, he decides that she is not “really” mature and consequently declines to waive the parental consent requirement.

Amin’s insights offer a critique of the arrogance of the Alabama courts—especially in light of what postmodernist thought has argued about the impossibility of one Truth, the overconfidence of Reason, and the

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58. *Ex parte Anonymous*, 812 So. 2d. at 1237-38 (emphasis added).

59. *In re Anonymous* I, 558 N.W.2d 784, 788 (emphasis added).

60. SHAHID AMIN, *EVENT, METAPHOR, MEMORY: CHAURI CHAURA 1922-1992*, at 94 (1995).

61. *Id.* at 95.



indeterminacy of "Fact."<sup>62</sup> In contrast, the Nebraska Supreme Court's restriction of its judgment to the sufficiency of the minor's *case* (as opposed to the sufficiency of the *minor*) should serve to qualify Amin's assertions on judicial discourse. It is only *some* courts—not judicial discourse *per se*—that endeavor to create a "master narrative" from the evidence presented. Jurists like those on the Nebraska court who issue judgments on the *representations* made to the court are less guilty of Amin's critique than other jurists who believe (as reflected in their language) that the representations (via evidence) made to the court allow them to discover and pronounce on a Truth that lies beneath them. Undeniably, there are those who equate the discharge of the burden of proof as confirmation that Truth has been ascertained. However, there are others who recognize the burden of proof as a legal fiction and acknowledge the impossibility of making unqualified Truth claims based on it. Overall, perhaps judicial discourse is only as arrogant in its creation of a master narrative as a particular jurist (or reader) believes it to be.

### B. *Signs of Truth*

The Alabama trial court did not deny the minor's petition because the facts she presented were themselves insufficient to demonstrate her maturity, but rather because the court did not believe the words that she said.<sup>63</sup> In concluding that her testimony was given "in an almost rehearsed manner" and without "any expression of emotion," the court did not find her a credible witness.<sup>64</sup> Here the metaphysics of Truth emerge: unrehearsed testimony and emotion correspond to Truth, whereas rehearsed testimony and lack of emotion corresponds to un-Truth.

#### 1. *Rehearsed and Unrehearsed Testimony*

The Alabama trial court may be surprised to discover that the preparation of witnesses prior to trial is a standard legal practice. Only in the most anomalous of cases would an attorney put a witness on the stand without preparing her. The rehearsal of testimony is the most standard of litigation practices. Yet, if rehearsed testimony indeed corresponds to un-Truth as the trial court held, then the practice of law in the United States is characterized by attorneys who have a fiduciary duty to construct lies. Indeed, the dissenting judge in *Ex parte Anonymous* convincingly argues as follows:

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62. See, e.g., JANE FLAX, THINKING FRAGMENTS: PSYCHOANALYSIS, FEMINISM, & POSTMODERNISM IN THE CONTEMPORARY WEST 188 (1990) ("[Postmodernists] reject representational and objective or rational concepts of knowledge and truth [and] grand, synthetic theorizing meant to comprehend Reality as and in a unified whole.").

63. The court, in fact, acknowledged that the minor "said all the correct words and was very well informed concerning her desire to obtain the Parental Consent Waiver." *Ex parte Anonymous*, 812 So. 2d at 1238.

64. *Id.* at 1236 (quoting *In re Anonymous*, 812 So. 2d at 1221).

I am certain that most, if not all, parties to litigation are told by their attorneys what they propose to ask and are asked what their answers to those questions will be. I cannot believe that the fact that the testimony of a party or a witness has been rehearsed indicates that the testimony is a lie. Perhaps I am naive to believe in the honor and integrity of the legal profession, but I think not; I cannot, and will not, assume that because an attorney did his or her duty in preparing a party or a witness for trial that the attorney suborned perjury.<sup>65</sup>

Is there something exceptional about the judicial bypass procedure, such that witnesses ought not to prepare their testimonies? Does rehearsed testimony correspond to un-Truth only when opposing counsel is not present? Are there different metaphysics of Truth depending on the presence or absence of an adverse party? The object of petitioning a court for relief remains the same without regard to whether an adverse party is present; in either scenario, one must present a convincing case to discharge one's burden of proof. Because the object of litigation does not depend on the presence or absence of opposing counsel, it seems incorrect to assume that the effect of rehearsal on Truth should hinge on that presence or absence.

## 2. *Emotion and Immaturity*

The trial court also found that the minor's lack of emotion impugned her credibility. Such logic indicates several assumptions about the role of reason, rationality, and emotion in the law.

Tracing back at least to the Enlightenment, emotion—one of the chief features of adolescence—has indicated immaturity and irrationality. Modernity was to be the era of reason's triumph over emotion: a person capable of self-government possesses Reason and lacks emotion. Autonomy "required republican man to split off his rationality and raise it to authority. . . . This meant that he had to devote his life to . . . sobriety, and to be the master of his passions and instinctual needs."<sup>66</sup> During the Age of Reason, philosophers extrapolated this argument to justify the disempowerment of non-Whites and women—in other words, those "Others" who were still governed by passions, instincts, and emotions.<sup>67</sup>

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65. *Id.* at 1239 (Houston, J., dissenting). Another dissenting judge made a similar point: "Likewise false is the implied premise that rehearsed testimony is false. If rehearsed testimony meant false testimony, lawyers would not be allowed, and indeed expected, to prepare their witnesses." *Id.* at 1240 (Johnstone, J., dissenting).

66. RONALD T. TAKAKI, *IRON CAGES: RACE AND CULTURE IN NINETEENTH-CENTURY AMERICA* 10 (1979).

67. See, e.g., GEORG W.F. HEGEL, *LECTURES ON THE PHILOSOPHY OF WORLD HISTORY* (H.B. Nisbet, trans., Cambridge Univ. Press 1975) (1837). Hegel philosophizes that "[i]n rational states, slavery no longer exists; but before such states have come into being, the authentic Idea is present in some areas of life only as an unfulfilled obligation, in which case slavery is still necessary: for it is a moment in the transition towards a higher state of development." *Id.* at 184. This explanation follows

The continued salience of Enlightenment ideology and its emphasis of reason over emotion might offer insight into why children and adolescents—with their “unruly” emotions—are believed to be incapable of self-government.<sup>68</sup> Perhaps the questionable tenet that reason and emotion are mutually exclusive explains the conviction that emotional teenagers are “immature”—that is, irrational and in need of parental guidance.

I do not subscribe to the view that emotion exists in a binary relationship with reason, or that the presence of emotion is indicative of immaturity.<sup>69</sup> However, I do not doubt the prevalence of this notion, which could well belong to the trial judge who heard the minor’s petition in *Ex parte Anonymous*.<sup>70</sup> Assuming this to be so, a paradox emerges: if, in the judge’s eyes, emotion corresponds to irrationality and immaturity but simultaneously indicates credibility, any petitioning minor would be confronted with an impossible task. If she conveyed emotion, the judge would find her credible but immature. If she conveyed no emotion, the judge might find her mature but insincere. Either way, she would fail to discharge her burden of proving both maturity and credibility.

In fairness, the trial judge might not always equate emotion with reliability; he might just have acknowledged such an equation in the case at hand. Or perhaps the judge felt that there was something unique about judicial bypass hearings—so that here, emotion corresponded with credibility even though it might not usually. But this raises an equally problematic chain of inference. Implicit in the equation of emotion with sincerity in the specific context of judicial bypass procedures is a normative judgment about abortion: a woman *should* be emotional if she is contemplating the

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Hegel’s explanation that Africa proper “has no historical interest of its own, for we find its inhabitants living in barbarism and savagery in a land which has not furnished them with any integral ingredient of culture.” *Id.* at 174. Thus, Hegel justifies the enslavement of African “negroes[ , who have] not yet reached an awareness of any substantial objectivity—for example, of God or the law.” *Id.* at 177.

68. Cf. ANN LAURA STOLER, *RACE AND THE EDUCATION OF DESIRE* 150 (2000) (“Students of colonial discourses . . . have often commented on a common thread: namely, that racialized Others invariably have been compared and equated with children, a representation that conveniently provided a moral justification for imperial policies of tutelage, discipline and specific paternalistic and maternalistic strategies of custodial control. [There was an] equation of children and primitive, of children and colonized savage . . .”).

69. For interesting discussions on the role of reason and emotion in law, see Susan Bandes, *What’s Love Got to Do With It?*, 8 WM. & MARY J. WOMEN & L. 97, 97-100 (2001) (discussing the relationship between emotion and reason in the context of feminist jurisprudence); Dan Kahan & Martha Nussbaum, *Two Conceptions of Emotions in Criminal Law*, 96 COLUM. L. REV. 269, 273 (characterizing the view that emotion does not contain or respond to thought as “mechanistic” and arguing that, in some criminal cases, this view can result in unjust decisions) (1996); Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1154 (1995) (arguing that legal discourse relies upon a dichotomization of reason from emotion).

70. One of the dissenting judges succinctly summarized and discharged the trial judge’s argument: “The implicit premise that a display of emotion reveals truth and the absence of emotion reveals a lack of truth, is false. Common experience does not establish any such correlation.” 812 So. 2d at 1240 (Johnstone, J., dissenting).

termination of her pregnancy. Hence, a judge subscribing to this normative view of abortion would find something *disingenuous* and *dissimulating* about a woman who wants to abort her pregnancy but shows no emotion when speaking about the topic.<sup>71</sup>

Obviously this assumes a view of abortion that not all hold. Not everyone views abortion as a necessary evil, a traumatic occurrence, or a crisis of epic proportions that invariably triggers emotional responses in "normal" persons. Abortion is not an inherently traumatic event; rather, it is socially constructed as such and is therefore frequently experienced that way. Surely some, or even many, women understand abortion differently and would not respond to its prospect with tears, fear, and panic. This analysis might reveal that a trial judge could deny a minor's petition not because the judge religiously opposed abortion (as one dissenting justice presupposed about the *Ex parte Anonymous* judge),<sup>72</sup> or because she had a "hidden agenda" to prevent as many abortions as possible (as the *Ex parte Anonymous* petitioner argued on appeal).<sup>73</sup> Instead, this analysis opens up the possibility that a judge's non-religious, non-moral, but entirely subjective view of abortion as a necessarily emotion-inducing occurrence could prevent her from perceiving sincerity behind a young woman's dispassionate or inexpressive demeanor. This is not to say that a judge's moral or religious view of abortion is not a factor in the formulation of her subjective view of abortion. Rather, it is to say that *other* non-moral and non-religious factors may produce expectations about the emotional nature of abortion and the judicial bypass procedure.<sup>74</sup>

### C. Cross-Examination as a Truth-Ascertaining Method

American legal commentary tends to value cross-examination as an effective tool for getting at the Truth that lies beneath witnesses'

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71. In the instance of the godmother's testimony, the trial court perhaps implies that a woman should be emotional even when she will not be undergoing the abortion herself but is merely speaking about someone else's abortion.

72. "Religious opposition to abortion in this state is so pervasive and intransigent that we especially need a standard of review on appeal that will differentiate effectively between those judgments based on the evidence and the law and those judgments based on nonjudicial factors." *Ex parte Anonymous*, 812 So. 2d at 1240 (Johnsone, J., dissenting).

73. The petitioner argued to the appellate court that "the *ore tenus* rule in these cases [have been used] as a means of allowing judges who have a bias against abortions to violate constitutional and statutory law." *Id.* at 1239. The Supreme Court of Alabama rejected the petitioner's argument, stating, "If by this argument the petitioner suggests that this trial judge has a hidden agenda that compels him to disregard the clear requirements of his oath of office, we have nothing before us to support such a conclusion." *Id.* The court argued that there was no "basis on which to impeach the integrity of the trial judge." *Id.*

74. For example, if a close acquaintance or relative of the judge had terminated a pregnancy (or suffered a spontaneous miscarriage) and had experienced the event as an emotional one, then the judge might expect that *all* women would experience similar emotions when faced with similar circumstances.

testimonial representations. Cross-examination is perceived as the ultimate mechanism for revealing deceptions and fabrications.<sup>75</sup>

On appeal, the *Ex parte Anonymous* petitioner argued that the trial court's failure to question the witness was a reversible error warranting the granting of the petition for waiver.<sup>76</sup> Additionally, a dissenting justice in *Ex parte Anonymous* was astonished that the trial judge failed to interrogate the young woman whose credibility was in doubt; quoting Shakespeare's *The Rape of Lucrece*, Justice Houston censured the trial judge's failure to cross-examine the witnesses:

The trial court asked the minor no questions, yet it found that "the minor's testimony was not believable and/or credible." That is hard for me to comprehend. Certainly, if the trial court believed that a witness who had not been cross-examined was lying, it had a duty "to unmask falsehood and bring truth to light."

The trial court also "questioned the credibility of the minor's godmother in her testimony." The godmother had not been cross-examined, yet the trial court did not question her. That is also hard for me to comprehend.<sup>77</sup>

Remarkably, the per curiam opinion held that though a trial judge undoubtedly has the power to act as an inquisitorial judge and cross-examine witnesses in a judicial bypass proceeding, she has no legal obligation to do so.<sup>78</sup> Instead of questioning the reliability of the trial court's judgment in light of its failure to cross-examine, this failure actually functioned to buttress the imperviousness of the lower court's opinion. That is, the Alabama Supreme Court essentially held that when cross-examination—a purportedly unique and indispensable tool for gathering truth—is found wanting, other more fallible and subjective techniques of truth-gathering (such as observation of "demeanor," "composure," "appearance," "tone of voice," and "expressions") must be relied upon in its stead.<sup>79</sup> Accordingly, in choosing not to cross-examine the witness, the trial court helped insulate its own decision from review; the reviewing courts were left with little but the

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75. See, e.g., Lloyd L. Weinreb, *The Adversary Process Is Not an End in Itself*, 2 J. INST. STUD. LEG. ETH. 59, 60 (1999) (noting that "[t]he great virtue of adversariness—and I agree that it is a great virtue—is that single-minded pursuit of the arguments for one side of a controversy is more likely to bring out all the arguments for that side than objective pursuit of the truth"). However, Weinreb cautions against the abuse of cross-examination as a truth-ascertaining method: "[W]e ought, so far as we can, prevent the perversion of cross-examination from a powerful means of verifying the truth to a means of falsifying it."

76. *Id.* at 1238 ("The petitioner seeks to overturn the trial court's judgment . . . by noting that the trial court did not ask any questions of the witnesses.").

77. *Ex parte Anonymous*, 812 So. 2d at 1239 (Houston, J., dissenting) (quoting WILLIAM SHAKESPEARE, *THE RAPE OF LUCRECE*, ln. 940).

78. *Id.* at 1237 ("Thus, where the trial court bases its findings in part on its assessment of the minor's demeanor in a proceeding where the minor is not subject to cross-examination, this Court affords those findings 'considerable deference.'") (citation omitted) (emphasis added).

79. *Id.* at 1237.

trial judge's reports of his firsthand observations.<sup>80</sup> This is all owing to a trial judge's unjustified whim to ask the witness no questions.

It is not clear why the trial judge in *Ex parte Anonymous* decided against cross-examining the young woman whose testimony he so entirely disbelieved. I can only venture that perhaps this refusal was due to the judge's complete subscription to the belief that abortion is a traumatic event, and that women will necessarily have an emotional response at the prospect of it. A judge convinced of this may believe that cross-examination is unnecessary to reveal what he already *knows*: a minor faced with an unplanned pregnancy who is strangely unemotional must be lying.

## V

### THE METAPHYSICS OF TEXT

#### A. *The Unreliability of Text*

The Supreme Court of Alabama's opinion presumes the radical unreliability of text. Deconstructionist philosopher Jacques Derrida explains that, since Plato, there has been in the Western tradition a belief that recorded speech in the form of text is untrustworthy insofar as it has been removed away from the performance of the speech.<sup>81</sup> Concomitantly implicit in this metaphysics of text is the idea that "live" speech allows a person greater access to the "truth" of the speech. The speaker's unspoken demeanor, composure, appearance, tone of voice, and expressions are the pathway to determining whether the representations made by the speech indeed correspond to some underlying truth.

It is not illogical to argue that the *ore tenus* rule, which affords "considerable deference" to the determinations of the trial judge, is premised on this belief in the unreliability of text.<sup>82</sup> The Supreme Court of

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80. The *ore tenus* rule, which will be discussed in greater detail in the next Section, provides that when facts—like the credibility of a witness—are in dispute, a reviewing court will give "considerable deference" to the determinations of the trial court. Thus, the *ore tenus* rule effectively forbids a reviewing court from disbelieving a trial court's credibility determinations.

81. "[Plato's] *Phaedrus* denounced writing as the intrusion of an artful technique, a forced entry of a totally original sort, an archetypal violence. . . . [W]riting, the letter, the sensible inscription, has always been considered by Western tradition as the body and matter external to the spirit, to breath, to speech . . . . Writing, sensible matter and artificial exteriority: a "clothing." It has sometimes been contested that speech clothed thought. . . . But has it ever been doubted that writing was the clothing of speech? For [the linguist] Saussure it is even a garment of perversion and debauchery, a dress of corruption and disguise, a festival mask that must be exorcised, that is to say warded off, by the good word." DERRIDA, *supra* note 3, at 34-35.

82. The Alabama Supreme Court first began applying the *ore tenus* rule when reviewing judicial bypass hearing appeals in June 2001. Previously, the Court had held that consent waiver denials should be reviewed under a less deferential standard. See Stephen P. Rosenberg, Note, *Splitting the Baby: When Can a Pregnant Minor Obtain an Abortion without Parental Consent? The Ex Parte Anonymous Cases (Alabama 2001)*, 34 Conn. L. Rev. 1109, 1122 (2002). However, Alabama is not the only state to afford considerable deference to trial courts' determinations; Indiana, Mississippi, and Ohio all use an "abuse of discretion" standard of review, under which "the judgment of the trial court

Alabama cited precedent when holding that *ore tenus* prevented it from reversing the trial court's assessment of the minor's credibility based on "her 'composure, analytic ability, appearance, thoughtfulness, tone of voice, expressions, and her ability to articulate her reason and conclusions.'"<sup>83</sup> The reviewing court presumed the trial court's correctness because "[w]ords in a transcript that suggest maturity may, in fact, be disputed by the delivery of the witness's own testimony and by her demeanor."<sup>84</sup> Because "demeanor" can not be reliably transcribed into a document, the court conceded that "the trial court is in the best position to determine these factual issues."<sup>85</sup> The state supreme court thus codified into a legal rule an ontology of text and "live" speech acts.

As noted earlier, the trial court contemplated how the recorded speech (and, therefore, the trustworthiness of its own opinion) would read to appellate judges.<sup>86</sup> It acknowledged that the speech of the petitioner, once removed from its performance and recorded into text, would be convincing in its representations of maturity. However, the trial court cautioned that the unrecorded non-verbal signs (which the court does not attempt to describe beyond the report that the testimony was "rehearsed" and "unemotional") destabilized the relationship between the minor's representations of maturity and the "truth" of her maturity. That is, the trial court asked the reviewing court to consider that the minor's otherwise believable verbal representations of maturity were accompanied by nonverbal signs that text can not possibly contain; these non-verbal signs negate the believability of the textually containable verbal signs.

The Supreme Court of Alabama heeded the warnings, holding that "[t]he trial court's conclusions . . . were based on its having viewed the witnesses as they testified and cannot be questioned on appeal, where we have before us only a cold, printed record."<sup>87</sup>

It is interesting to contemplate what this belief in the unreliability of texts says about jurists' philosophy of the nature of law. That appellate courts may hear questions of law presented to the trial court but may not adjudicate questions of fact reveals much about how the law is

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will not be disturbed unless it is 'arbitrary, unreasonable, or unconscionable.'" *Id.* at 1119 (quoting *Breech v. Turner*, 712 N.E.2d 776, 780 (Ohio Ct. App. 1998)). In contrast, Nebraska reviews judicial bypass hearing appeals *de novo*, meaning that "appellate courts independently 'reappraise the evidence as presented by the record and reach [their] own independent conclusions with respect to the matters at issue.'" *Id.* (quoting *In re Anonymous 2*, 570 N.W.2d 836, 838 (Neb. 1997)).

83. *Ex parte Anonymous*, 812 So. 2d 1234, 1237 (Ala. 2001) (internal citation omitted) (emphasis added).

84. *Id.* (internal citation omitted).

85. *Id.* (internal citation omitted).

86. *Id.* at 1238 ("The court recognizes that the words on the transcript of this case appear that the minor said all the correct words and was very well informed concerning the desire to obtain the Parental Consent Waiver.") (quoting the unpublished trial court decision).

87. *Id.*

conceptualized. Whenever an appellate court hears a question of law, it is through its presentation via a "cold, printed record"—that is, via a brief. Judges may hear oral arguments to elaborate upon the brief, but the "cold, printed record" remains an indispensable element of the appellate court's task. However, despite the predominately textual nature of the presentation, appellate courts feel capable of resolving questions of law. They do not afford "considerable deference" to the determinations of the trial judge on such questions. Accordingly, unlike a witness's believability, jurists believe that law remains unqualified by text—or rather that the law is less qualified by the text than is credibility. It may correspond to a belief that law exists wholly outside of text—or, alternatively, that law is completely containable within text.

The Alabama judiciary articulates a metaphysics of text that quite closely parallels that articulated by many historians and historical anthropologists; that is, the Alabama judiciary and a powerful school of historians both subscribe to the belief that text is secondary to speech or performance witnessed firsthand. Ginzburg, particularly, privileges "live" sources over "dead" written sources. He argues, "Historians of past societies cannot produce their sources as anthropologists do. Archival files, seen from this point of view, cannot be a substitute for tape recorders."<sup>88</sup>

Of course, Ginzburg's comment privileges too greatly the anthropological method in assuming that tape recorders enable a greater approximation to truth, or possibly reality, than written documentation. Though anthropologists in the field may be able to interview their informants and sources directly—thereby enabling the observation of demeanor, tone of voice, and all those other indicators that supposedly ensure the credibility of the speech—those non-verbal signs do not record well onto tape recorders. When the anthropologist transcribes her notes, she has to record non-verbal signifiers in a manner quite similar to that of a court reporter. Furthermore, due to the time interval between the speech act of an informant and the transcription of the speech act, frequently the anthropologist must rely on her *memory* of the non-verbal signs that were performed simultaneous to the speech act. And, of course, this memory may not be reliable.

Additionally, Ginzburg mentions Clifford Geertz—the father of interpretive anthropology whose seminal text, *The Interpretation of Cultures*, is a mainstay in many, if not most, anthropology departments—a few pages later to indicate that anthropology is a highly textual discipline; however, Ginzburg does not acknowledge Geertz's admonition that anthropology is an *interpretive* discipline—meaning that the anthropologist necessarily

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88. GINZBURG, *supra* note 22, at 159.



inserts her subjectivity into the enterprise.<sup>89</sup> It is that very subjectivity—in addition to the act of transcription—that serves as a medium between the performed speech and the narrative the anthropologist later constructs about that speech.

Thus I question the privileging of “live” sources over written sources as a closer approximation to truth or reality. The meaning of those non-verbal signifiers of credibility, such as demeanor or tone of voice, is frequently underdetermined and therefore subject to interpretation. Whether a pause, a stutter, a refusal to maintain eye contact—or a cool, dispassionate rendering of rehearsed speech—are understood as signs of unreliability depends on the subjective interpretation of the anthropologist—or, more problematically for pregnant adolescents in Alabama, on the judge.

### *B. Coercion of “Facts” and Hierarchies*

However, Ginzburg’s and other historians’ skepticism about archival sources is not simply a result of the textual nature of the sources; it is also a result of the nature of many archival sources as “official” documents. As Ranajit Guha explains, “Historians know all too well how the contents of a series in an official archive or a company’s record room derive much of their meaning from the intentions and interests of the government or the firm concerned.”<sup>90</sup> Additionally, *legal* documents concerning litigation are even more problematic to the anthropologist, as they are frequently formed via coercive means. Indeed, coercion—the subpoena, the oath whose violation of which triggers the State’s wrath, the possibility of a default judgment should a party fail to participate properly in litigation—is what brings about many litigation-related documents in the first instance.

Furthermore, the narrative of the event contained in the legal document is abstracted from the context in which the event took place; the abstraction serves to allow the application of “objective” legal rules to a series of “facts.” This is the barrenness of legal documentation. Legal documents detach “an experience from its living context and [set] it up as an empty positivity outside history.”<sup>91</sup>

Faced with the barrenness of legal documentation, historians attempt to contextualize them such that they will actually reveal something more than what the jurists looked upon them to say. Shahid Amin examined every kind of record he could find in order to tell a story about the Chauri Chaura riots that was “more than” the story told in the court records. In his analysis of a case involving the prosecution of a group of women for the

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89. “[A]nthropological writings are themselves interpretations, and second and third order ones to boot. (By definition, only a ‘native’ makes first order ones: it’s *his* culture.)” CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 15 (1973).

90. GUHA, *supra* note 55, at 37.

91. *Id.* at 38

death of another woman, Ranajit Guha attempted to “undermine the abstract legality of the text”<sup>92</sup> by conjecturing about the benign intent of the community of women who came to the decedent’s aid. It is these anti-judicial conjectures that establish the “condition of contextuality”<sup>93</sup>—that is, those “linkages” that enable the historian to work a decontextualized document “into the torn fabric of the past and restore it to an ideal called the full story.”<sup>94</sup> These speculations and inferences make an event that was once claimed by the law available as an event of history.

If coercion and extraction are indeed the work that the making of a legal document performs on lived experience, it is fascinating (and disturbing) that a judicial bypass proceeding asks young women to try to speak through barren legal discourse about an event as deserving of detail and context as an unplanned pregnancy and an attendant desire for an abortion. In effect, the procedure compels adolescents to “flatten” out their experience into legal testimony so that a court can rule whether this flattened experience does or does not prove something as complex as “maturity.” Can age, grade in school, grade point average, post-secondary-school plans, and the number and general substance of conversations had about one’s pregnancy—all those things that are recorded and made into legal discourse—really reveal a young woman’s “maturity”? Does the number of fights an adolescent has had with her parents, and a general description of some of the worst, provide sufficient knowledge of an event as complex as a “parent-child relationship”?<sup>95</sup> Does it provide enough information that a judge can determine whether an abortion without parental consultation is really in a young woman’s “best interest”? The law appears to compel the construction of a decontextualized narrative about such complex aspects of a young woman’s life that it is not mysterious that these young women frequently fail to meet their burden.

If one were to act like an historian and contextualize the testimony given in *Ex parte Anonymous*, one would have to speculate about the experiences of the petitioner. What must it have been like to be seventeen years old and living with one’s “religious” grandmother? Would the age

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92. *Id.*

93. *Id.* at 37.

94. *Id.*

95. When inquiring into whether abortions without parental consent are in the best interests of minors, many states (including Alabama) consider the nature of the minor’s relationship with her parents. Nevertheless, even when pregnant young women provide evidence that their relationships with their parents are less than positive, courts are hesitant to rule that an abortion would be in their best interests. For example, the Texas Supreme Court declined to overturn a consent waiver denial even though the petitioner had shown that her parents had previously kicked her pregnant sister out of their house. *See Rosenberg, supra* note 82, at 1119 (citing *In re Doe* 4, 19 S.W.3d 322, 326 (Tex. 2000)). Also, the Ohio Supreme Court affirmed a lower court’s decision to deny a consent waiver even though the petitioner had shown that her father was violent and had hit her in the past. *See id.* (citing *In re Jane Doe* 1, 566 N.E.2d 1181, 1184 (Ohio 1991))

and generation differential have made the minor more independent or more dependent on her primary caretaker? How did the grandmother feel about the minor's relationship with her eighteen-year-old boyfriend? Did she even know about it? How would a secrecy surrounding her romantic relationship have affected the young woman?

I pose these questions—the answers to which are less important than the fact they we do not know them—not to argue that the minor was “legally mature” (whatever that means), but rather to demonstrate that contextualization might simply mean posing questions that the trial court thought irrelevant. Contextualization would mean building perspective around an event that was cut off by legal discourse, cut off through the crushing of complexity into the mold of “testimony.”

Faced with the “cold, printed record,” the Supreme Court of Alabama might have attempted to act like a historian and contextualize the document in front of them. However, they were stymied from doing so by their profession and their discipline. Jurists—being legal technicians and not anthropologists or historians—are forced to deal with legal documents as they are. If they choose not to remand the case with the instruction for the lower courts to develop the record further, then they are forced to presume the presence of everything *legally* relevant to the matter at hand in the “cold, printed record.”

### CONCLUSION

*Ex parte Anonymous* reveals how judges in Alabama are influenced by their cultural assumptions about abortion. Some judges appear to believe that the prospect of an abortion is an invariably emotional event to a woman carrying an unplanned and unwanted pregnancy. According to this view, mature women considering abortions—even those with their “minds made up,” so much so that they are now appearing in court to ensure that they can obtain the desired abortion—will unavoidably demonstrate emotion. Further, these judges appear to harbor a view of what a young woman's emotion will *look like*: it will look like tears, an occasional choked-back sob, tension in the face and shoulders, and so forth. Never will emotion look like calm—particularly from an otherwise energetic and active teenager. Never will it look like resolve. These cultural assumptions, in turn, inform judges' conclusions about whether or not testimony is credible and young women are mature within the meaning of the parental consent statute.

I have suggested that the metaphysics of emotion that equates its absence with dissimulation does not correspond to “the way things are,” or rather, the Truth about abortion or the Truth about Speech. Instead, this metaphysics of Emotion is a particular, far from absolute philosophy that is allowed to masquerade in judicial bypass hearings as the One True

Ontology because of the power possessed by the person who subscribes to it—that is, the trial judge. The *ore tenus* rule, which itself codifies a particular and far from absolute metaphysics of Text, further insulates this metaphysics of Emotion from challenge.

Faced with a “cold, printed record,” a reviewing judge might act as a historian or a historical anthropologist and try to contextualize the document in front of her. She might ask questions of the text that the trial judge did not pose to the petitioning young woman. She might attempt to draw inferences based on what she knows of the culture of the place that produced the document. She might theorize about the effect that an unplanned pregnancy would have on the life of a 17 year-old girl living in the household of her religious grandmother in Alabama: might finding herself pregnant under such circumstances be a maturing event in and of itself?

Yet, judges cannot theorize; they can only adjudicate based on the evidence presented to them. Accordingly, this case study demonstrates a shortcoming of the legal system. This shortcoming is not particular to the state of Alabama; rather it is intrinsic to what law is. Therein lies my critique of law and legal discourse. As an institutional matter, trial courts consider as evidence only what is presented to them as such. As an institutional matter, appellate courts can only review what is presented to them via records, briefs, and the oral arguments about the records and briefs. “Judicial notice” of societal or cultural facts, in both instances, is supposed to be circumscribed. Yet, I have suggested that legal fact finders might learn from anthropologists and historians; they might learn that legal fact-finding is just one of many ways to ascertain some kind of truth. Further, they might learn that legal fact-finding, as a method of ascertaining truth, is riddled with inadequacies and deficiencies imposed on it institutionally—and that it ought, at times, to be buttressed with other, extra-legal fact-finding methods. But, law must contain itself entirely within the legal. The “outside” of the law must remain outside; otherwise, law is no longer law. Thus, historical and anthropological fact-finding is banished from the legal system and injustices are invited in.

In this Essay, I have tried to reveal a little of what Law is and is thought to be through the analysis of a Supreme Court of Alabama decision. I hope that the Essay is more than a scathing critique of an individual court decision (which it undeniably is); rather, by using the “micro” instance of an affirmation of a trial court’s decision as an entrée into a discussion of more “macro” issues, I hope that this Essay is also a critique of parental consent and notification laws for adolescents’ abortion specifically, as well as law and legal discourse more generally.