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April, 1992**Theoretics of Practice: The Integration of Progressive Thought and Action*****1195 THE PRACTICE/THEORY DILEMMA: PERSONAL REFLECTIONS ON THE LOUISIANA
ABORTION CASE
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Introduction

As a law professor and practicing lawyer, I try to work on cases that are consistent with my feminist perspective in two ways. First, I try to choose cases that address issues fundamental to the subordination of women. Second, I try to utilize legal theories in ways that are consistent with feminist jurisprudence. In other words, I evaluate both the substantive issue and the theoretical approach that I will be utilizing to determine my willingness to work on a case. Both these inquiries serve an overarching commitment to make my practice consistent with my feminist theory.

Nevertheless, during the course of litigation, it is easy to lose sight of one or both of these elements. Factors that can lead to compromise include: the limitations of the judicial process through various technical requirements such as form and page limitations; the need to work with co-counsel who may have different theoretical or practical agendas; and the ways in which the facts of a case or the clients' needs may not fit my political or legal agenda.

These factors are often in the back of my mind as I work on cases, but never before have I systematically tried to consider them during and after working on a case. In response to an invitation from the Hastings Law Journal to participate in this conference and theme issue on the "Theoretics of Practice," I decided to consider these issues while writing an amicus brief for the Fifth Circuit in the Louisiana abortion case, *Sojourner T. v. Roemer*. [FN1] I knew that I would not be able to attend the *1196 conference because it was to be held in the last month of my pregnancy. Nonetheless, I hoped to interact with the conference participants by writing an essay on the practice/theory dilemma.

Initially, my intention was to keep a journal while writing the brief in order to document the issues I faced. Not surprisingly, my practical difficulties (getting the brief written on time and coping with the exhaustion caused by my pregnancy) [FN2] overrode my theoretical ambitions. Given the choice between writing one more draft of the brief and making an entry in a journal, I opted for the draft-one of my easier practice/theory dilemmas. Consequently, I have had to reconstruct my brief-writing experience in this Essay from memos and notes produced during the appellate process.

My reasons for wanting to publish my reflections on the practice/theory dilemma are twofold. First, I recently published an essay in the *Harvard Women's Law Journal* in which I criticized feminists for not writing sufficiently feminist amicus briefs in abortion cases. [FN3] I made two *1197 central arguments in that essay: that feminists could be more "dialogic" in writing briefs by not dismissing the importance of the state's purported interest in valuing life in all of its various forms (including prenatal life); and that feminists should focus on equality arguments rather than privacy arguments in writing briefs on abortion-related issues. I was soundly criticized by two practitioners for my naïveté in calling for more dialogic briefs and for not understanding the doctrinal futility of making equality arguments. [FN4] These criticisms made me wonder whether my essay on feminist litigation was located in an academic ivory tower, rather than being truly applicable to the real world of feminist litigation. Having never written a brief in an abortion case, I decided to see whether my theoretical ideas about a truly

"feminist" brief would be applicable in a real case. Moreover, writing about my practice/theory dilemmas would provide an opportunity to reflect on the relative success of my theoretical perspective in practice.

Second, I was very excited about the amicus brief and wanted the chance to share it with a national audience. This theme issue gives me that opportunity. Sharing the brief with others is motivated by two desires: the desire to influence future briefs on the abortion issue, and the desire to expose people to the equality arguments available to challenge an abortion statute. Because writing the brief was, for me, a political project, I have tried to take advantage of whatever opportunities were available to inform others of its contents—through speaking engagements, op-ed pieces, and now this Essay.

Despite my desire to influence other brief writers, I realize my brief is both limited and enhanced by its status as an amicus rather than a chief brief. Unlike a party's chief brief, an amicus brief provides the author with an opportunity to be at once creative and political. A chief brief has many mandatory elements, such as the statement of facts, framing of the issues, and technical statutory arguments. The lawyer who writes a chief brief has enormous responsibilities to her client. Irrespective of her politics or dislike of a particular legal argument, she is obligated to make whatever argument will give her client the best chance of winning. An amicus brief, particularly an appellate amicus brief, has few such constraints.

*1198 An amicus brief serves as an opportunity to develop creative alternative arguments that would not fit neatly into a chief brief, although they might be compatible with such a brief. For example, it has become a routine practice for the American Civil Liberties Union (ACLU) to raise the equality issue in its complaint in an abortion case but not to develop that theory in any of its briefs in the case, because privacy theory stands a better chance of prevailing. By writing an amicus brief that raises the equality issue, I hoped to alert the court to the fact that a plaintiff need not lose should the right to choose abortion no longer receive heightened protection under privacy doctrine. Raising the issue in an amicus brief may slow down an appellate court that is willing to conclude that *Roe v. Wade* [FN5] has already been modified. Alternatively, it sets the stage for developing the equality issue on remand, should *Roe* be overturned. Because amicus briefs are limited to twenty pages, it was not possible to develop the equality argument fully in *Sojourner T.* At most, then, the amicus brief raised the issue, so that it can be more fully developed at a later date. In writing amicus briefs on the abortion issue, [FN6] I have benefited from reading equality briefs written by other practitioners; I hope that others will benefit similarly from my briefs.

Planning and Community Organizing

My Theoretical Standpoint

My theory and practice have recently led me to focus on the abortion issue. This choice requires no explanation to a feminist audience, but it is especially appropriate for me because I live in Louisiana. Louisiana has consistently led the anti-abortion movement by enacting laws criminalizing nearly all abortions and providing for lengthy prison terms.

The Louisiana legislature's nearly absolute ban on abortion [FN7] is a striking example of complete disregard for women's lives and well-being in the name of "protecting" life. The statute contains several key elements which, in my view, make it the harshest in the country. First, the preamble expressly states that the state's interest is, "to the greatest extent possible, ... to protect the life of the unborn from the time of conception *1199 until birth." [FN8] Second, although the statute does not subject a woman who has an abortion to punishment, it prohibits the termination of pregnancy with the following exceptions: (a) the abortion is performed "for the express purpose of saving the life of the mother"; (b) the surgical termination of pregnancy is performed "to preserve the life or health of the unborn child or to remove a dead unborn child" from the pregnant woman; or (c) the abortion is performed upon a victim of rape or incest, where that victim has complied with numerous reporting requirements within one week of the alleged rape or incest. [FN9] Thus, a woman has to be on the verge of death in order to procure an abortion.

Further, the statute defines conception as the "contact of spermatozoan with the ovum" but does not define pregnancy. [\[FN10\]](#) Because it purports to prohibit all devices that would terminate a pregnancy from the moment of conception, the statute's sloppy language also suggests that many forms of birth control, such as a low dose birth control pill or IUD, would be prohibited. No other state has enacted a statute with so narrow a health exception and without explicit recognition that birth control remains lawful.

When the Louisiana legislature enacted its abortion statute, during the summer of 1991, I immediately offered my assistance to the local ACLU affiliate. My services were not needed at the trial court level; [\[FN11\]](#) a federal judge quickly granted the plaintiff's request for an injunction [\[FN12\]](#) and the State appealed to the Fifth Circuit. After the trial court decision was rendered, I called the ACLU and suggested writing an amicus brief focusing on the impact this statute would have on disadvantaged women in the state. Moreover, I offered to write the brief from an equality rather than a privacy perspective.

As I have written in previous articles, abortion statutes disproportionately affect the most disadvantaged women in our society, particularly adolescent females, poor women, minority women, and women with handicaps. [\[FN13\]](#) From an equality perspective, disadvantaged women cannot *1200 afford to be let alone in their reproductive lives—they need the state to fund abortions under Medicaid; they need public hospitals to provide abortion services along with other reproductive services; and they need the state not to impose barriers such as waiting periods, mandatory hospitalization, and physician-monitored informed consent. Our abortion doctrine under Roe is erroneously premised on a white, adult, able-bodied, middle-class woman who can afford to purchase reproductive services, including abortion. Focusing on disadvantaged women and equality arguments will shift the core of our abortion doctrine from privileged women to disadvantaged women. Placing the lives of disadvantaged women on the pages of briefs filed in court is the first step in this process. That was my intention in Sojourner T. [\[FN14\]](#)

At the outset, I faced many challenges in combining theory with practice. First, I knew the ACLU favored a privacy approach and might not approve of an equality approach. As the author of a brief in support of the plaintiff-appellees, I felt an obligation not to undercut their position. However, I also believed I was entitled to present alternative theories to the court. The ACLU's exclusive focus on the privacy approach may not be the best way to further its clients' interests, because such a focus inhibits the development of alternative approaches such as equality. Thus, although I wanted to be supportive of the ACLU, I was not about to sacrifice my own political and theoretical integrity.

Second, an amicus brief is filed on behalf of organizations, not an individual. While fully believing that disadvantaged women within my community would benefit from the articulation of an equality approach, I also realized they were unlikely to understand the difference between an equality and a privacy approach. They might understand that they were being represented in the appellate process, but, as lay people, they might not care about or share my own theoretical choices.

A question I therefore had to resolve was how much effort to put into explaining to community groups the significance of choosing an equality, rather than a privacy, perspective. Arguably, I acted unethically at this point by putting little effort into this part of the project. Although every group that signed the brief saw at least the summary of argument, I did not discuss with most of them the significance of the choice of doctrine.

I rationalized this decision by noting that representation in an amicus brief is not the same kind of representation as in a chief brief. The *1201 chief brief in Sojourner T. already contained a privacy argument and purported to represent all women in the state. My brief simply supplemented the chief brief. In addition, my clients had not sought special representation and would not have participated had I not volunteered to write an equality-based amicus brief. In a sense, they were doing me a favor by lending their names in support of my efforts, rather than the reverse. (Had they approached me with a specific

agenda and asked me to write a brief on their behalf, my obligations would have been different.) Most importantly, I truly believed that my arguments—focusing on the statute's impact on the most disadvantaged women in the state—would prove beneficial to my clients. Absent that belief, I would not have written the amicus brief. Finally, had there been time to discuss my theoretical framework, we probably would have agreed on the central issues raised by the brief.

Throughout my work on the case, I faced an ongoing dilemma about how much work I could do while pregnant. (I had become pregnant in May, and the baby was due in mid-February.) Having experienced two miscarriages in the previous year, I did not want to experience a third. Also, until October I was extremely nauseous and did not know, from day to day, how much time I could devote to the brief. Therefore, I had to be extremely well organized, for the brief had to be on time; I could not afford to get behind. These pregnancy-induced time pressures influenced my judgment on a number of decisions, such as how much time to spend discussing the project with the parties I was representing.

The deadline for the brief was Monday, October 21st, but I told myself, and others working with me, that the deadline was October 18th, to leave room for error in the event of illness or exhaustion. [\[FN15\]](#)

Finding Clients

I needed clients to represent and, at the outset, extended an invitation to my colleague, Wendy Brown, to assist me on the brief, and, specifically, in finding clients. Wendy had had experience with client networking in her earlier work on an amicus brief in the Webster case. [\[FN16\]](#) *1202 Wendy also is very active in the African-American community in New Orleans, so I thought she would be able to network quite effectively in our home community. In late August I also began to call people at the ACLU and Planned Parenthood for suggestions regarding potential clients. Louisiana Planned Parenthood initially indicated they were interested in participating, and they seemed like ideal clients because they had an office in the St. Thomas Housing Project. [\[FN17\]](#) After speaking with my contacts, I made up a tentative list of community groups to contact, but soon ran into problems getting agreement from these groups to participate.

For instance, I attempted to obtain the signature of the Louisiana Psychiatric Association's Committee on Women, but was informed that the entire Association would have to sign on. This threatened to undermine my plan to describe all participating groups as "women's groups." [\[FN18\]](#) Obviously, that would be impossible if the entire Association signed on. Moreover, the Association did not fit the desired profile of groups that represented disadvantaged women. But I did not have a long list of potential clients, and, because they understood the purpose behind my brief, I felt their participation would be genuine. In addition, the entire Association's support would look good because their mainstream and respected role within the larger community would add credibility to my description of the harm the anti-abortion statute would work on women's lives. Finally, the Association was the only group that approached me on its own initiative. As one of a public interest lawyer's top priorities should be to represent groups that desire representation, I felt a responsibility to accommodate them. The Psychiatric Association's participation, however, forced me to make an initial compromise—to forgo representing women's groups alone. That compromise was acceptable because it did not require any change in the theoretical focus of the brief. The only change it necessitated was in how I described the groups in my motion requesting permission to file an amicus brief. On the positive side, the Association's participation allowed me to highlight women with *1203 handicaps, including women with mental illness, and its medical expertise served to improve those arguments.

Another problematic group was Women for Women with AIDS. Although their director was enthusiastic about the brief, she informed me that the organization could only participate if a consensus to do so were reached among all the group's clients. Not surprisingly, that proved to be impossible within the available time. This left me with no AIDS-oriented group for whom I could claim to speak. [\[FN19\]](#) Nevertheless, my request appears to have served a useful political purpose in forcing the or-

ganization to discuss its position and achieve a consensus among its members on the Louisiana abortion statute.

Because I wanted to focus on the AIDS issue, [\[FN20\]](#) I needed an AIDS organization to participate and therefore contacted the New Orleans AIDS (NO/AIDS) Task Force. Though their Board agreed to participate, their lawyer drafted their statement of interest in a way that threatened to undermine much of the brief and therefore was unacceptable. He insisted on concluding their statement of interest with a paragraph emphasizing that the Task Force joined the brief only to the extent it discussed the problems of women with AIDS. The paragraph read:

As an agency that deals on a daily basis with the needs of HIV-infected individuals, many of whom are women, the NO/AIDS Task Force joins in this amicus curiae brief as it relates to the health of those women who are either HIV positive or have been diagnosed with AIDS which is addressed in Section I(B)(2) regarding women with handicaps. To that extent, the NO/AIDS Task Force supports this amicus curiae brief. [\[FN21\]](#)

I consulted Wendy Brown and another colleague, both of whom agreed that this disclaimer was unacceptable because it undercut our other clients. The disclaimer suggested that they joined the brief only insofar as it addressed problems pertaining particularly to women with AIDS, and not to the extent that it discussed other groups of disadvantaged women. This kind of problem can arise when a lawyer attempts to represent multiple clients with divergent interests and is not unique to brief writing. It *1204 is an unavoidable aspect of coalition politics-finding ways to bring groups together, to combat the larger community's tendency to pit us against each other. My instinct, and that of my colleagues, was to require that any group joining the brief join in its entirety. We did not want our efforts to fuel any strife between our clients. Therefore, we adhered to the policy that a group join the entire brief or forgo participation in the coalition.

Prior to this point in the process, I had not focused on the special needs of individual client groups. I had been trying to persuade groups to endorse my political agenda, rather than considering how the interests of one group might undercut those of another group. The NO/AIDS Task Force's response to my efforts reminded me of my ethical responsibility to attend to the needs of my clients.

After clarifying my position through discussions with others, I discussed the statement of interest with the Executive Director of the Task Force, explaining that we could not accept the group's participation unless the last paragraph was omitted. After brief negotiations, during which he offered to delete the last sentence but not the last paragraph, we agreed the Task Force should not participate. I followed up this discussion with a letter. The letter criticized the Task Force strongly for refusing to work with their lesbian and straight sisters who have been so central to the AIDS movement, and for allowing fundraising considerations to narrow the organization's focus. I have included the full text of my letter to the Executive Director of the NO/AIDS Task Force in an appendix so the reader can see how I responded to this problem within my community. [\[FN22\]](#)

Because I see writing an appellate amicus brief as a political task, I think it is important that community-based groups be asked to consider their position on the issues raised by the brief. My brief prompted the NO/AIDS Task Force to discuss its position on abortion. In addition, it provided me with an opportunity to respond to that position from the standpoint of one who is very politically active on both the AIDS and abortion issues. Although discussion within the NO-AIDS Task Force did not result in a strong pro-choice position, discussion within Women for Women with AIDS ultimately did result in a strong pro-choice position. Thus, I think it can fairly be said that our brief helped create an important and productive dialogue regarding abortion within the AIDS activist community, even though neither of these groups participated in the brief itself.

*1205 Another community group with which I had difficulty was the National Council for Negro Women of Greater New Orleans. I contacted them because the national organization had a pro-choice position and had joined Wendy's brief in the Webster case. We were warned that, in the past, the local branch had been reluctant to join pro-choice efforts. But we also

heard that their reluctance might have been because of time constraints rather than philosophical problems. When I sent the director of the organization a description of the brief, she informed me that her board would be meeting soon and would respond in a week or so. I never heard from her again, despite leaving two telephone messages. Eventually Wendy informed me that the Council had voted not to participate. Although we were never offered any explanation for their refusal, the large number of Catholics in the New Orleans organization leads me to believe they were unable to reach a consensus on the abortion issue.

Planned Parenthood of Louisiana also turned out to have problems joining the brief. Their attorney decided to file a brief on the organization's behalf in the Fifth Circuit to argue an abstention issue that related to their pending state court case. [\[FN23\]](#) Although they were philosophically behind our efforts, they felt they could not sign two entirely unrelated briefs in the same Fifth Circuit appeal. [\[FN24\]](#)

The final group we contacted was an African-American sorority-Delta Sigma Theta. Wendy had a contact with that group and thought she could get them to participate. Unfortunately, her contact had graduated and she was unable to obtain their consent to be named on the brief.

Thus, as of approximately two weeks before the brief was due, only two community groups had agreed to participate: the Women of Color Reproductive Health Forum, and the Louisiana Psychiatric Association. *1206 Desperate for more clients, I called the national ACLU and Wendy. I then contacted Leslie Gerwin, a local attorney and former Tulane Law School professor, who heads pro-choice lobbying efforts in Baton Rouge. Leslie offered us a list of local pro-choice groups, along with telephone contacts. She also sent a mailing on our behalf, which Wendy and I followed up with telephone calls. Unfortunately, many of the groups probably never received the mailing because of errors in their mailing addresses. Our list contained contact people rather than offices for most of the groups; if the contact person became inactive, the mail seemed to get lost. Thus, when Wendy and I made our telephone calls, we usually found ourselves speaking with someone who knew little or nothing about our efforts.

Ultimately, a wide variety of organizations did join the brief-Black Women for Choice; the Community Relations Committee, Jewish Federation of Greater New Orleans; Louisiana Choice, New Orleans Chapter; the Louisiana Psychiatric Association; Louisiana National Organization for Women; the New Jersey Women Lawyers Association; and the Women of Color Reproductive Health Forum. But the final list of participants was more a result of happenstance than deliberate action on our part. The Jewish organizations joined the coalition because Leslie Gerwin had contacts with them, even though they probably would have preferred a brief focusing on the religion issue. [\[FN25\]](#) The New Jersey Women Lawyers Association joined the brief to express their objection to their bar association's decision to hold a meeting in New Orleans. Approximately half the client groups were local organizations representing disadvantaged women and therefore fitting my original profile for the brief.

In retrospect, I see my difficulty in "signing on" groups that fit my original profile as a not unusual problem, at least in the South. For example, Planned Parenthood recently asked me to author a brief in the Fifth Circuit on the Mississippi abortion case, *Barnes v. Moore*, [\[FN26\]](#) focusing on the impact of the statute on disadvantaged women. They assured me they already had groups desiring representation and simply needed an author for the brief. I was therefore able to focus all my efforts on writing the brief on the assumption that client groups had already been selected. In fact, Planned Parenthood experienced many of the same problems finding clients that I had encountered in Louisiana. They eventually *1207 developed a list of client organizations but were disappointed at how few of the ultimate list proved to be local organizations directly representing disadvantaged women.

The difficulties I experienced in organizing groups to participate in the amicus process may be reflective of the larger problem of organizing groups in conservative communities to oppose anti-abortion efforts. If the women of Louisiana were more politically organized, one might expect that the state legislature would not be able to enact the harshest anti-abortion statute in the United States. But the problem is not merely one of political disorganization. Women in the South, on average, simply are not as pro-choice as women in the Northeast, where the national pro-choice groups are based. [\[FN27\]](#) Thus, women involved in the New Orleans chapters of groups such as the National Council for Negro Women will not necessarily share the pro-choice perspective of their counterparts in the New York chapter of the same organizations.

From the outset I understood that it might be difficult to get women's organizations in Louisiana to support my brief. For this reason, I chose to write a moderate, or narrow, brief that focused exclusively on the extreme harshness of the Louisiana statute and did not make assertions about other states' statutes. I also made this choice clear to my potential clients and, in some cases, it may have helped win their support. No matter how moderate the brief, however, I could not persuade all the groups we contacted to participate because the brief was, at root, a pro-choice brief on the abortion issue.

Finally, I learned the not surprising fact that, had I given potential client groups more time to come to a decision, more of them would have joined the brief. However, because I was determined to meet the artificial October 18th deadline, I turned down the late offers. Had I been willing to wait until the last minute to file, I could have enlisted the support of at least three more national, African-American organizations. I felt guilty for placing fear about my own health over persuading more organizations to join our efforts, but I asked Wendy to communicate to these organizations that we would welcome their participation at the Supreme Court level.

***1208 Working with Students**

Student assistance in this project seemed especially appropriate for two reasons. First, it would make the task of writing the brief easier, especially the performance of research at the medical school library. Second, student involvement would help to politicize the Tulane Law School community with respect to abortion. Although most students at Tulane seem to be pro-choice, there has been no groundswell of student activism on the abortion issue. I hoped my leadership on the issue would inspire them to become more politically involved.

Fortunately, there were a number of sources of potential student assistance. Tulane Law School has a community service requirement for its students. They must complete twenty hours of community service in order to graduate. It also has a women's law association. Although the women's law association has typically not been particularly politically active, in the last couple of years it has sponsored public lectures on reproductive health issues. I also was teaching a large family law class that focused on feminist as well as reproductive issues. Since I wanted to get help on the brief in the way most likely to mobilize my home community, I turned to the community service program for assistance and publicized my efforts to the women's law association and my family law class.

Nonetheless, the utility of student assistance was uncertain. One logistical difficulty was organizing a large number of students and keeping them busy. In addition, I would not select the students; they would select the project. Thus, there was no way to insure the quality of their work. Delegation could easily weaken the quality of the research. Dean Kramer said he would try to provide some supervisory help, but that assistance never materialized. Thirty students quickly signed up to work on the brief and I had to set ground rules immediately to limit and control student participation.

First, I took steps to limit the number of students involved with the project. I required all students interested in participating to attend a meeting on September 13th, and refused to take any volunteers after that date. I also required all student work to be turned in by September 23rd, so that I would have a chance to review it before writing the brief (and to allow for late sub-

missions). Second, I assigned two students to each project in order to be reasonably assured of adequate work quality. Because I knew most of the students who volunteered, I was able to assign some of the more difficult assignments to the best students. I also told the students to provide me with a photocopy of any source upon which they relied so that I could double-check their research. Not surprisingly, the student work varied enormously in its quality. I had students, for example, *1209 provide me with cases that were not "shepherdized." Had I not checked their research, I could have greatly embarrassed myself. Other students, however, provided extensive medical research that proved to be very useful. The most pleasant surprise was the students' timeliness. Accustomed as I am to students handing in assignments late, it was pleasing to see them take this deadline seriously.

It is hard to gauge how successful student involvement was on a political level. The students did seem to take a strong interest in the case. I continually run out of copies of the brief and students often come by my office to express their appreciation for the opportunity to work on it. Most of the student-volunteers attended a moot court exercise I organized on the case. Many of them also attended the oral argument in the Fifth Circuit. Thus, involving students does seem to have helped arouse in them a keen interest in the case. When I later initiated a similar project on the Mississippi abortion case, many of the same students again volunteered to assist, even if they had already completed their mandatory community service requirement. I therefore benefited personally from their logistical assistance, while they hopefully became more politically involved in their community.

Doctrine

I have written a great deal about the abortion issue but, until this brief, had never practiced in this area of the law. In my academic writings, I have insisted that we should pursue an equality perspective rather than a privacy perspective on abortion. As I have discussed elsewhere, my reasons for preferring equality over privacy are both theoretical and practical. [FN28] I have never liked the privacy approach because it is too individualistic in nature; moreover, I prefer an equality approach because it best describes how pregnancy-related restrictions relate to women's overall equality in society. I believe women should have the right to choose whether to terminate a pregnancy not because of their right to control their bodies but because of their right to the opportunity to achieve full and equal citizenship in society. Because we live in a society that does virtually nothing to facilitate pregnancy, childbirth, and child *1210 care, and, instead, imposes all of these burdens on women, I believe it is essential that women be free to choose pregnancy, rather than be coerced into maintaining an unwanted pregnancy. The burdens placed on women's reproductive capacity by society are, in my view, fundamental to women's inequality in society. Thus, I have tried to develop an equality perspective in my academic writing to explain why abortion-related restrictions violate the Equal Protection Clause of the Fourteenth Amendment.

Doctrinally, it is difficult to be successful under an equality perspective. The Supreme Court's decisions in *Geduldig v. Aiello* [FN29] and *Personnel Administrator v. Feeney* [FN30] are two major stumbling blocks. In *Geduldig*, the Court held that pregnancy-related restrictions are not per se gender-based restrictions, which would have entitled the petitioner to heightened scrutiny. Many feminists have challenged the *Geduldig* decision, arguing that it is absurd not to view pregnancy as a sex-based classification. [FN31] In *Feeney*, the Court held that a petitioner can obtain heightened scrutiny through evidence of a gender-based impact (as opposed to a gender-based classification) only if she can also demonstrate that the legislature enacted the legislation because of rather than despite its impact on women. Few cases have even been attempted and virtually none have been successful under this stringent requirement.

Although I agree that *Geduldig* was wrongly decided and ought not to preclude an anti-abortion statute from receiving heightened scrutiny, I chose not to challenge *Geduldig* in the Louisiana case. [FN32] Instead, I chose the more difficult task of meeting the impact-intent standard set forth in *Feeney*.

Theoretical and practical reasons led to that decision. On a theoretical level, I believe feminists have focused too exclusively on *Geduldig* without pursuing the possibilities of a Feeney approach. By using the Feeney standard, I hoped to turn its doctrinal problems into an advantage. On a more basic level, the Feeney standard is problematic because it requires the plaintiff to prove the legislature intended the statute's disparate***1211** impact on women. This is a very difficult standard of proof. In the Louisiana case, however, strong evidence exists that the legislature knowingly harmed women's well-being through enactment of the anti-abortion statute. [\[FN33\]](#) One of my primary goals was to put the evidence of intent into the record; the Feeney burden of proof would require me to do so. Thus, rather than try to avoid the Feeney standard by arguing the case involved per se gender-based discrimination, I decided to use the Feeney burden of proof directly. Although meeting the Feeney standard is difficult, given the evidence, I welcomed the opportunity to meet that challenge.

Another way to consider the choice between a *Geduldig* and a Feeney approach is to think of the choice as one between a theoretical and a pragmatic approach. In order to proceed under a per se standard of discrimination, a section of the brief would have had to be devoted to distinguishing *Geduldig*, or arguing that *Geduldig* was wrongly decided. That discussion would have been doctrinal and not tied to the special facts existing in Louisiana. In contrast, under the Feeney standard I had no choice but to put lots of facts about intent into the record. Given my desire to focus on the facts, the pragmatic rather than the theoretical approach was the natural choice. [\[FN34\]](#)

Although I wanted to write an "equality brief," I was not sure how far that argument would reach in striking down abortion statutes elsewhere. Being a resident of Louisiana and personally committed to overturning our abortion statute, I chose not to focus on the broader implications of my argument for other pending cases. I felt comfortable representing just the disadvantaged women of Louisiana; other attorneys could represent women in other states in other cases.

I understand that other lawyers have used the amicus process to shape the law generally rather than to focus on the case directly before the court. I rejected that option because I felt it would disserve the women of Louisiana. Louisiana consistently has had the most onerous anti-abortion law in the country. Louisiana's new statute will literally cause the death of women to an extent not threatened in other states. It seems clear to me that the Supreme Court will dramatically modify *Roe v. Wade* so as to uphold nearly all anti-abortion statutes. My hope, however, ***1212** is that even a conservative court will see that the Louisiana statute is in a league of its own—that it fails to pass muster under any level of scrutiny because it does not even provide an exception to protect the pregnant woman's health unless her life is threatened. Broad theoretical pro-choice arguments often lose sight of the range of injustices that state legislatures have imposed on women's lives. I wanted Louisiana to be held accountable for its record of injustice against women and to show how Louisiana stood alone in the western world in its disrespect for women (and children). [\[FN35\]](#) A broad theoretical argument would be less likely than a focused, pragmatic argument to achieve that result.

As I had promised, I sent a draft of the brief to the national ACLU. Although I was not representing the ACLU, I was writing a brief in support of their position in the case. They had assisted me by sending me equality briefs that had been filed elsewhere. Their briefs, however, proved not to be particularly useful in the Louisiana case because they argued that anti-abortion statutes constitute per se gender-based discrimination. As discussed above, that was not the approach I chose to take. [\[FN36\]](#) Reading their briefs, however, put me on notice that they probably would not be comfortable with my presentation of the equality position.

As expected, the ACLU representative was concerned about several aspects of the brief. First, she was concerned that it might undercut their arguments in similar cases involving Utah, Guam, and Pennsylvania statutes. [\[FN37\]](#) She did not perceive a significant difference between a Louisiana statute with a life exception and Utah and Guam statutes with a health exception. Second, she objected to the brief's concession that the appropriate standard of review was intermediate rather than

strict scrutiny. She suggested strict scrutiny could be obtained by arguing that reproductive issues are so basic to women's equality they require strict scrutiny. Her argument was basically additive: equality plus privacy equals strict *1213 scrutiny. Moreover, she planned to argue strict scrutiny on remand if the court asked her to brief the equality issue, and she wanted to avoid disagreement with our brief on that issue.

In response to the first point, I said my client was Louisiana, not Utah or Guam. She then pointed out that I might be undercutting my own clients by giving the court a narrow way to overturn the Louisiana statute-leaving the legislature free to enact a statute with a health exception next year. Having decided to focus my efforts on the women of Louisiana, rather than all the women of the United States, I was unconcerned about whether my argument would be applicable to Utah or Guam. However, I was troubled by the idea that my argument might undercut the women of Louisiana. I therefore agreed to think further about this problem.

At this point, I faced a serious dilemma. Was I undercutting my clients by making too narrow an argument and by not arguing for the highest possible level of scrutiny? I discussed this with many of my colleagues, some of whom had worked previously with the ACLU. They all agreed that a narrow brief was in my clients' best interest and that national organizations have a tendency not to consider the specifics of their particular client groups. Nonetheless, they did suggest the possibility of arguing in the alternative about the level of scrutiny, in case the court wanted an opportunity to apply strict scrutiny to a gender case.

Therefore, I decided to argue in the alternative regarding the appropriate level of scrutiny and drop clarifying footnotes to ensure that the brief not appear to endorse the Guam or Utah statute. One problem with this approach was that it used up valuable paragraphs, and the Fifth Circuit's twenty page limit is strictly enforced. This meant giving up part of my original argument. For example, I had to delete a discussion about Spain (one of Louisiana's civil law ancestors) in order to argue in the alternative concerning *Geduldig* and the standard of scrutiny.

Her second point, the additive argument for strict scrutiny, was not very convincing. The court would only reach the equality issue if it construed *Roe* no longer to require strict scrutiny. In addition, this additive theory has never received much support from the Supreme Court. Nevertheless, I promised to think about the issue, and ultimately added one sentence making the additive argument, seeing no doctrinal harm in arguing for strict scrutiny. I did, however, regret the loss of valuable space through that argument.

Before filing the brief, I sent the ACLU a final draft; they had only one technical suggestion regarding the labelling of the addendum. I assumed that the ACLU was not totally pleased with the shape of my argument. *1214 But in the end, it was my brief and not theirs. Because I value their work in the reproductive health area, I did my best to accommodate their views without undercutting my own and those of my clients. Since the brief purported to "support" the position of the appellees (the ACLU's clients), I did not think it appropriate to ignore the ACLU's views entirely. On the other hand, because an amicus brief is not directly on behalf of a particular party, I believe it was appropriate to differ with the ACLU's basic approach. Indeed, one might argue that the importance of amicus briefs is to allow the development of positions not likely to be developed in the chief briefs. I hope our brief supported the efforts of the ACLU, while presenting a novel theory to the court.

Post-Brief Political Work

Filing the brief was a political act. I wanted to get the equality arguments on the table and describe in detail what kind of an impact this statute would have on disadvantaged women in Louisiana. But the brief was only a starting point. The public relations department at Tulane suggested writing an op-ed essay on the brief, and I did. They placed the op-ed piece in the *Dallas Morning News*. [\[FN38\]](#) In April 1992 I spoke at Southern Methodist University (SMU) Law School in Dallas on the Louisi-

ana and Mississippi abortion cases. (Some professors on the SMU faculty indicated that the op-ed piece had already generated some discussion of these issues at SMU.) The ACLU asked me to organize a moot court for Janet Benshoof, the ACLU lawyer who argued the Louisiana case in the Fifth Circuit. I conducted the moot court at Tulane on the day before the oral argument in the Fifth Circuit and invited my student-volunteers to attend. Many of the students also attended the oral argument. They reported to me how much they enjoyed attending the moot court and seeing the oral argument in progress.

Despite misgivings about using clients for my own political ends, I take some consolation from the fact that the groups that ultimately participated seemed quite excited about their participation. Many of them called after the Fifth Circuit oral argument to find out how the case was going. It thus seems that they, in fact, attained some sense of empowerment through participating in the process, even if I was using them for purposes they may not have understood entirely.

Although adopting and developing an equality perspective created some tension with the ACLU, I later received substantial thanks from *1215 the ACLU for my efforts. Nadine Strossen, the President of the ACLU, indicated that she was very interested in the development of the equality theory. In addition, Janet Benshoof spoke about the equality perspective in a public television program on abortion a few days before the oral argument in the Fifth Circuit. I, in turn, gained valuable insight on the equality theory from discussions with Benshoof, and was able to incorporate some of her ideas into my Mississippi brief. In retrospect, it seems I may have overestimated my differences with the ACLU while working on the brief.

Since writing the federal Louisiana brief, I have written two other briefs in abortion cases. One was filed with the Louisiana State Supreme Court [FN39] and the other, the Mississippi case, was filed with the Fifth Circuit. [FN40] In the Louisiana state case, an adolescent had sought permission to obtain an abortion from a state court judge, as required under our juvenile bypass statute. [FN41] The judge had appointed an attorney to represent the fetus, and had allowed that attorney to subpoena a witness (the alleged father of the fetus). Working with another attorney, I successfully challenged those requirements under Louisiana state constitutional law. [FN42] In this case, I was representing my client directly, rather than through the amicus process. Despite my misgivings about privacy doctrine, I relied heavily on privacy doctrine in this case because Louisiana state constitutional law tracks *Roe v. Wade* without modification. The entire case was resolved successfully within four days, including an appeal to the Louisiana Supreme Court. My priority was unquestionably to help obtain an abortion for my client at the earliest possible moment; I spent no time worrying about my theoretical perspective concerning the choice of legal doctrine on abortion. Her immediate health and well-being were my sole concern. This experience has helped me recognize the opportunity offered by the appellate amicus process to develop legal theories in a way rarely present in day-to-day direct client representation.

In addition, I have done numerous interviews and speaking engagements. In its Spring 1992 issue, Tulane Law School's Alumni magazine, *The Tulane Lawyer*, featured my pro-choice work in an article that I hope will inspire some Tulane graduates to become more involved in pro-choice efforts. [FN43] At public speaking engagements on the subject, I have *1216 had fun playing off the visibility of my pregnancy. When, for example, a state legislator tried to describe my position as "pro-abortion," I stood up displaying my eight months of pregnancy and said that I would not be pregnant if I were pro-abortion rather than pro-choice. Such actions might be considered grandstanding, but they make a point many anti-abortion advocates would like to deny—that their opponents are pro-choice rather than pro-abortion. Finally, I have written this Essay and spoken at SMU and Northwestern University law schools to let others know about the situation in Louisiana.

I do not expect to be cited in the Fifth Circuit's opinion, but I hope my work serves to inform others of the dramatic consequences that the Louisiana statute will have on women's lives. In this way, perhaps I can help prevent the enactment of such onerous statutes elsewhere.

Conclusion

Writing a tight, twenty page argument that develops a theoretical perspective while representing clients is a challenging but enjoyable task. In the future, I would start earlier in trying to find clients and make more effective contacts in my own community. I might also stay more independent of national organizations, so that I can more accurately assess and represent my local constituency's needs. [\[FN44\]](#)

In retrospect, I do not believe that I faced enormous difficulties in combining theory and practice, perhaps because of the many compromise decisions I made before beginning the project. I did not use any novel form of argument. Because I disdain the rhetorical style of brief writing, my voice was probably a bit less argumentative than is typical in a brief. [\[FN45\]](#) But I did not interweave women's voices or do anything else equally unusual, as has been done in some briefs. [\[FN46\]](#) I felt so constrained by the page limitation that the only possible style of writing seemed to be a terse style. Within the constraints that I identified at the outset, it was *1217 a satisfying project. I have attached the actual brief to this Essay so that the reader can determine for herself or himself how successful I was in my task.

[\[FN1\]](#). Professor of Law, Tulane University. A.B. 1978, Harvard University; J.D. 1981, Harvard Law School.

[\[FN1\]](#). No. 91-3677 (5th Cir. filed Aug. 8, 1991). The amicus brief is reprinted following this Essay as appendix A. Brief Amicus Curiae of Black Women for Choice; The Community Relations Committee, Jewish Federation of Greater New Orleans; Louisiana Choice; Louisiana National Organization for Women; Louisiana Psychiatric Association; The National Council of Jewish Women, Greater New Orleans Chapter; The New Jersey Women Lawyers Association; and the Women of Color Reproductive Health Forum in Support of Appellees, *Sojourner T. v. Roemer*, No. 91-3677 (5th Cir. filed Aug. 8, 1991) (amicus brief filed Oct. 21, 1991) [hereinafter *Sojourner T. amicus brief*].

[\[FN2\]](#). During the course of my pregnancy, I have written three pro-choice briefs in an effort to protect every woman's right to choose whether to carry a pregnancy to term. Being pregnant made me more committed than ever to helping other women avoid being coerced into pregnancy. It also made me so tired that I often found it difficult to continue with my legal practice. Despite my feminism, I felt guilty putting my own physical needs above my practice.

I recently confided in a female colleague that I was frustrated that people at work had expected me to work so hard during my pregnancy. She said in response, "Did you ever try telling them that you are tired? You always walk around telling people how good you feel and then you are surprised when they don't empathize with your exhaustion!" Ironically, I also felt somewhat selfish in deciding to have a child, because that choice meant taking time away from my political work. Another female colleague confided in me that she felt embarrassed to tell people she was pregnant with her third child, because she thought they would consider her insufficiently committed to her work. (Of course, many men on our faculty have had several children, and no one thought they were less committed to their work.)

These comments have helped me to better recognize the subtle pressures on professional women to be superwomen and never say "no" to additional assignments. It is therefore not surprising that my pregnancy was one of the more productive periods of my life—a resolution of the practice/theory dilemma of which I am not proud because it puts pressure on other pregnant women to overachieve during their pregnancies. So long as women are a minority within the legal profession, it will be difficult to escape work pressures like those I experienced during my pregnancy.

[\[FN3\]](#). See Ruth Colker, *Feminist Litigation: An Oxymoron?—A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, 13 HARV. WOMEN'S L.J. 137 (1990) [hereinafter *Colker, Feminist Litigation*]; Ruth Colker, *Reply to Sarah Burns*, 13 HARV. WOMEN'S L.J. 207 (1990) [hereinafter *Colker, Reply*]. See also Ruth Colker, [An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class, 1991 DUKE L.J. 324](#) [hereinafter *Colker, An Equal Protection Analysis*] (developing equality perspective to challenge United States reproductive health

policies).

[FN4]. See Sarah E. Burns, Notes from the Field: A Reply to Professor Colker, 13 HARV. WOMEN'S L.J. 189 (1990); Naomi R. Cahn, [Defining Feminist Litigation](#), 14 HARV. WOMEN'S L.J. 1 (1991).

[FN5]. [410 U.S. 113 \(1973\)](#).

[FN6]. Since writing the amicus brief in the Louisiana case, I have written an amicus brief on the Mississippi abortion case pending in the Fifth Circuit. Brief Amicus Curiae of The National Black Women's Health Project; Center for Constitutional Rights; Mississippi Voting Rights Project; Mississippi National Organization for Women; National Organization for Women, Central Mississippi Chapter; Mississippi Human Services Agenda; Women's Project; and Certain Mississippi Clergy in Support of Appellees, *Barnes v. Moore*, No. 91-1953 (5th Cir. filed Sept. 3, 1991) (amicus brief filed Feb. 19, 1992) [hereinafter *Barnes* amicus brief].

[FN7]. 1991 La. Acts 26 (codified at [La. Rev. Stat. Ann. § 14:87 \(West Supp. 1992\)](#)).

[FN8]. 1991 La. Acts 26, § 1 (preamble).

[FN9]. [La. Rev. Stat. Ann. §§ 14:87\(A\)-\(B\) \(West Supp. 1992\)](#).

[FN10]. *Id.* [§ 14:87\(D\)\(4\)](#).

[FN11]. This was the first time that I had offered assistance to the ACLU and had my offer turned down. Previously, the ACLU had contacted me whenever an abortion case was pending in Louisiana. I do not know why my offer was rejected; perhaps my offer never reached the appropriate person. I would, however, have participated in this case at the trial court level had my offer been accepted. I did not deliberately wait to enter the case until the appellate level.

[FN12]. [Sojourner T. v. Roemer](#), 772 F. Supp. 930, 931 (E.D. La. 1991).

[FN13]. See, e.g., Colker, *An Equal Protection Analysis*, supra note 3 (discussing an equal protection challenge to United States reproductive health law and policy and focusing on adolescent females).

[FN14]. That is also my intention in my forthcoming book, *RUTH COLKER, ABORTION & DIALOGUE: PRO-CHOICE, PRO-LIFE, AND AMERICAN LAW* (forthcoming 1992).

[FN15]. In fact, I did get sick on October 19th, so it was fortunate that the brief was at the printer by the 18th.

[FN16]. See Brief Amicus Curiae of The National Council of Negro Women, Inc.; National Urban League, Inc.; The American Indian Health Care Association; The Asian American Legal Defense Fund; Committee for Hispanic Children and Families; The Mexican American Legal Defense Fund and Education Fund; National Black Women's Health Project; National Institute for Women of Color; National Women's Health Network; Organización Nacional de la Salud de la Mujer Latina; Organization of Asian Women; Puerto Rican Legal Defense and Education Fund; Women of Color Partnership Program of the Religious Coalition for Abortion Rights; Women of All Red Nations, North Dakota; YWCA of the U.S.A.; and Other Organizations in Support of Appellees, [Webster v. Reproductive Health Services](#), 492 U.S. 490 (1989).

[FN17]. The St. Thomas Housing Project is a public housing unit in one of the poorest neighborhoods in New Orleans.

[FN18]. Because my project was to write an equality brief on behalf of women, which focused on the facts of disadvantaged women's lives, I wanted the groups that I represented to be able to speak directly to those facts. As a privileged group of medical professionals, most of whom are men, the entire Association did not fit my original profile.

[FN19]. After the brief was filed, their director informed me that the group had decided to participate. But, of course, by then it was too late to include them.

[FN20]. Pregnancy depresses cell-mediated immunity, thereby causing more rapid progression of HIV infection. It also greatly increases the risk of complications from pregnancy. Sojourner T. amicus brief, *supra* note 1, at 9, reprinted in app. A *infra*. Because the Louisiana legislature was made aware of these medical facts but chose to reject an amendment providing an exception for women with HIV infection, *id.* at 12, I had a strong argument that the legislature, in enacting the statute, knowingly shortened the lives of pregnant women with HIV infection.

[FN21]. Facsimile of Statement of Interest, NO/AIDS Task Force, *Sojourner T. v. Roemer*, No. 91-3677 (5th Cir. filed Aug. 8, 1991) (October 17, 1991) (draft on file with author).

[FN22]. The text of the letter is reprinted following this Essay as appendix B.

[FN23]. The strategy with regard to the Louisiana statute was to pursue two parallel lawsuits—a state suit arguing that the statute violated the state constitution, and a federal suit. Planned Parenthood had primary responsibility for the state suit and the ACLU had primary responsibility for the federal suit. A decision was rendered first in the federal suit enjoining the enforcement of the statute, thus putting the federal suit on a faster track than the state suit. See [Sojourner T. v. Roemer, 772 F. Supp. 930 \(E.D. La. 1991\)](#). The state suit has been stayed pending the outcome of the federal suit. See *Planned Parenthood v. Louisiana*, Civ. No. 370,917 (La. Dist. Ct. Aug. 14, 1991) (order granting plaintiff's motion to stay). The state court judge indicated, however, that he would enjoin enforcement of the Louisiana statute under state law if *Roe v. Wade* were overturned by the federal courts and the federal injunction were lifted. *Id.*

[FN24]. A few months later, however, Planned Parenthood did ask me to write an amicus brief in the Fifth Circuit representing disadvantaged women with regard to the Mississippi abortion statute. See *Barnes v. Moore*, No. 91-1953 (5th Cir. filed Sept. 3, 1991). I agreed to write the brief from an equality perspective and they fully supported my efforts. It seems clear, then, that Planned Parenthood's inability to participate in my Louisiana brief was due to logistic rather than substantive inconsistencies.

[FN25]. Leslie Gerwin told me that the Jewish organizations would have preferred a brief that made the argument that the state cannot establish a particular religious viewpoint by criminalizing abortion.

[FN26]. See *supra* note 24.

[FN27]. I have no empirical support for this statement; however, it is interesting to note that in the recent Louisiana statewide election, not one candidate ran on a pro-choice platform. Clearly, political candidates do not perceive either the men or women of Louisiana as favoring a pro-choice position.

[FN28]. A group-based equality approach is more consistent with a feminist perspective on the abortion issue for the following reasons: an equality approach, if successful, would provide fuller protection for all women in society by reversing the abortion funding decisions; an equality approach best indicates our valuation of fetal life as well as a woman's right to terminate a pregnancy; and an equality approach is more communitarian rather than individualistic. For further discussion, see

Colker, Feminist Litigation, supra note 3; Colker, Reply, supra note 3, at 207 n.3.

[FN29]. [417 U.S. 484 \(1974\)](#).

[FN30]. [442 U.S. 256 \(1979\)](#).

[FN31]. See generally Sylvia A. Law, Rethinking Sex and the Constitution, 132 U. PA. L. REV. 955, 983 (1984) (describing the numerous criticisms of Geduldig as a "cottage industry").

[FN32]. Nevertheless, I did recently challenge the applicability of Geduldig to an abortion-related restriction in a brief filed in the Fifth Circuit on the Mississippi abortion statute. See Barnes amicus brief, supra note 6. In Barnes I decided to challenge the applicability of Geduldig rather than try to meet the impact-intent standard under Feeney because the legislative history was bare and did not provide strong evidence of intent. Practical rather than theoretical considerations prompted that decision.

[FN33]. Sojourner T. amicus brief, supra note 1, at 11-12, reprinted in app. A infra.

[FN34]. I would not make the same decision, however, in all abortion cases. As discussed above, because such evidence of intent was not clearly present in Mississippi case, I chose a somewhat more abstract doctrinal approach in that case aiming to distinguish Geduldig. Nevertheless, even in the Mississippi case, I set up the doctrinal framework so as to provide for extensive factual discussion of the statute's impact on disadvantaged women.

[FN35]. Some of the clients implicitly expressed the same point of view by asking me to write a "moderate" brief, at least that was how I interpreted their request. To be honest, I had made the decision to pursue this more moderate approach before any of the clients indicated their preference for that approach. Consequently, I made no attempt to convince my clients to seek a broader and more theoretical approach.

[FN36]. Their briefs, however, did prove useful when I tried to distinguish Geduldig in the Mississippi case.

[FN37]. I am not comfortable publicly reporting these conversations because the ACLU deserves a great deal of credit for the extraordinary job it has done in preserving our reproductive freedom on a small budget and with a very overworked staff. I fully understood why we had our differences on this brief. Out of respect for their work, I tried to accommodate their views as best as I could without sacrificing what I perceived to be the interests of my clients. Without the ACLU's work, the Louisiana legislature would have criminalized abortion more than decade ago.

[FN38]. Ruth Colker, Louisiana Abortion Ban is a Very Real Threat to Women, DALLAS MORNING NEWS, Feb. 6, 1992, at 23A.

[FN39]. In re [Application of Jane Doe](#), 591 So. 2d 698 (La. 1991).

[FN40]. Barnes v. Moore, No. 91-1953 (5th Cir. filed Sept. 3, 1991)

[FN41]. [La. Rev. Stat. Ann. § 40:1299.35.5\(B\) \(West Supp. 1992\)](#).

[FN42]. [Jane Doe](#), 591 So. 2d 698.

[FN43]. See Ivy Jefferson, Abortion Laws in Louisiana: Fueling Fires and Setting Precedents, TULANE LAWYER, Spring

1992, at 18 (alumni magazine article describing author's pro-choice activities).

[FN44]. Despite my good intentions, I was even more dependent on national counsel in the Mississippi case, because I took no responsibility for finding clients to represent. In the Mississippi case, I also compromised in terms of the substance of the brief after consulting with both Planned Parenthood and the NAACP Legal Defense Fund. My pregnancy was also a key factor in making this compromise. The brief was filed in the Fifth Circuit on February 19th, and my baby was born on February 20th-I was literally heading to the hospital while my New York co-counsel was heading to the Federal Express office with the brief. To be part of a national pro-choice network, such compromises may be necessary.

[FN45]. See Colker, *Feminist Litigation*, supra note 3.

[FN46]. See e.g., Lynn M. Paltrow, *Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists*, 9 WOMEN'S RTS. L. REP. 3 (1986), for an example of an amicus brief that interweaves women's stories.

***1219 Appendix A**

United States Court of Appeals For The Fifth Circuit

Sojourner T., Jane, Ida B., James Degueurce, M.D. Calvin Jackson, M.D., Pamela

Branning, M.D. Hope Medical Group for Women, Delta Women's Clinic West,
Causeway Medical Suite, Emilia Bellone, M.S.W., Reverend Kathleen Korb and

Rabbi Michael Matuson, **Plaintiffs-Appellees**

-- versus --

Buddy Roemer, Governor of Louisiana, William J. Guste, Jr., Attorney General of

Louisiana and Harry Connick, Sr., District Attorney for the Parish of Orleans,

Defendants-Appellants

No. 91-3677

On Appeal From The United States District Court For The Eastern District of

Louisiana

BRIEF FOR BLACK WOMEN FOR CHOICE; THE COMMUNITY RELATIONS COMMITTEE, JEWISH
FEDERATION OF GREATER NEW ORLEANS; LOUISIANA CHOICE; LOUISIANA NATIONAL
ORGANIZATION FOR WOMEN; LOUISIANA PSYCHIATRIC ASSOCIATION; THE NATIONAL COUNCIL
OF JEWISH WOMEN, GREATER NEW ORLEANS CHAPTER; THE NEW JERSEY WOMEN LAWYERS
ASSOCIATION; AND THE WOMEN OF COLOR REPRODUCTIVE HEALTH FORUM AS AMICUS CURIAE
SUPPORTING APPELLEES

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***1220** United States Court of Appeals For The Fifth Circuit

Sojourner T., et al., Plaintiffs-Appellees

-- versus --

Buddy Roemer et al., Defendants-Appellants

No. 91-3677

On Appeal From The United States District Court For The Eastern District of
Louisiana

Brief for Black Women for Choice et al., as Amicus Curiae Supporting Appellees

STATEMENT OF THE ISSUE

Whether Act 26 of the 1991 Louisiana Legislature ["the Act"], criminalizing abortion and many forms of contraception, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution by discriminating against women?

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***1222 INTEREST OF THE AMICUS CURIAE**

BLACK WOMEN FOR CHOICE is a New Orleans based organization founded to encourage participation by women of color in the effort to protect the right of women to choice in all aspects of life, especially regarding the choice to bear children. We are particularly concerned with educating adolescent women on reproductive issues so that they can make informed decisions about their bodies. It is clear that such decisions have long-lasting, and potentially adverse effects, on future opportunities in education, employment, and other important phases of life. This is especially true for women of color. We agree with the other amici that the legislation enacted by the Louisiana state legislature, which severely curtails choice, should be struck down.

THE COMMUNITY RELATIONS COMMITTEE, JEWISH FEDERATION OF GREATER NEW ORLEANS, is an umbrella organization representing all major Jewish organizations and synagogues in Greater New Orleans. It is committed to having abortion be a safe and legal procedure, free of government interference, for all women consistent with their own private religious beliefs.

LOUISIANA CHOICE, NEW ORLEANS CHAPTER is committed to working with electoral and legislative processes to ensure a woman's right to safe and legal abortion. Because the Louisiana legislature has refused to protect women lives and well-being, LOUISIANA CHOICE joins the other amici in requesting this court to overturn the Louisiana criminal abortion statute.

THE LOUISIANA NATIONAL ORGANIZATION FOR WOMEN is the state affiliate of the National Organization for Women, an organization of over 250,000 members committed to taking action to secure equal rights for women, including the right to safe and accessible birth control and abortion. It joins this brief, because it believes that Louisiana's abortion law violates the equal rights of women.

THE LOUISIANA PSYCHIATRIC ASSOCIATION, whose membership consists of over 450 psychiatrists, affirms its position that abortion is a medical procedure and that the early termination of pregnancy is a matter to be decided by the patient

and the physician. Because of the potentially adverse emotional consequences of unwanted pregnancy on families and society, the Louisiana Psychiatric Association opposes all constitutional amendments, legislation, and regulations curtailing family planning and abortion services to any segment of the population.

***1223 THE NATIONAL COUNCIL OF JEWISH WOMEN, GREATER NEW ORLEANS CHAPTER**, is a community service organization committed to the advancement of human welfare through the activities of volunteers engaged in a multifaceted coordinated program of education, advocacy and services. It joins this brief in an effort to protect the welfare of the women of Louisiana, consistent with their own religious values.

THE NEW JERSEY WOMEN LAWYERS ASSOCIATION ["NJWLA"] is a non-profit bar association formed for the purpose of identifying issues of concern to women attorneys, and to study and advise the public and its membership on issues affecting the legal status of women. As such, the attention of the NJWLA membership has been called to the issue before the Court, namely Louisiana's criminal abortion statute and its negative impact on the legal status of women. The NJWLA therefore joins in the brief of amicus curiae in support of equality for women.

THE WOMEN OF COLOR REPRODUCTIVE HEALTH FORUM is sponsored by the Council on the Concerns of Women Physicians of the National Medical Association. The National Medical Association represents approximately sixteen thousand African-American Physicians nationwide. A major goal of the Women's Council is to improve the health status of African-American women, particularly the underserved and underrepresented.

The state of Louisiana has been chosen as one of the states of focus for the project given the poor reproductive health indices in the areas of teenage pregnancy, cancer, sexually transmitted diseases, and infant mortality. The **REPRODUCTIVE HEALTH FORUM** Project's task is to increase the quantity and quality of reproductive health care services to African-American women, and to empower African-American women to adopt more preventive health behaviors.

The new abortion law negatively impacts the major goal of the projects as it worsens the health status of African-American women. Prior to *Roe v. Wade*, 70% of all abortion-related deaths were African-American women. Whenever reproductive rights are abrogated, women of color die first, and disproportionately. We join the other amici in urging this court to strike down the discriminatory anti-abortion legislation in issue.

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***1227 SUMMARY OF ARGUMENT**

The Act, which criminalizes abortion and contraception, discriminates against women. It therefore violates the equal protection clause of the Fourteenth Amendment, as well as the right to privacy. This brief focuses on the equality issues.

The Act would cause a devastating, disparate impact only against women. It would shorten women's lives, harm their reproductive capacities, as well as sharply reduce their standard of living. Although the Louisiana legislature was made aware of this impact, it consistently refused to pass any amendments to the Act that would lessen this impact.

Appellants cannot justify this impact against women, because the means chosen do not substantially serve the state's purported objective of protecting life. Virtually no other geographical unit in the western world has passed such a restrictive measure in the twentieth century. Louisiana has unconstitutionally disregarded the value of women's lives in its radical attempt to protect embryonic life from the moment of conception.

The Act reflects an out-moded view of women as compulsory bearers and caretakers of children that is drawn from Louisiana's nineteenth century civil law tradition. The equal protection clause requires Louisiana to move its civil law tradition into the twentieth century by respecting the lives and well-being of women.

***1228 ARGUMENT**

I. THE ACT DISCRIMINATES AGAINST WOMEN

A. INTRODUCTION

In the complaint filed in this case, plaintiffs alleged that the Act, which criminalizes abortion and many forms of contraception, discriminates against them as women. The Act violates their sex-based equal protection rights as guaranteed by the Fourteenth Amendment, because it:

imposes burdens upon women's reproductive choices and bodily integrity that are not imposed upon the reproductive choices of men, contributes to negative stereotypes about women, and prevents women from becoming full and equal participants in society. (Amended Complaint ¶ 118)

Because the district court decided the case on the basis of plaintiffs' privacy claim, it did not reach the equal protection claim. The court stated: "I recognize that if the Supreme Court overrules *Roe v. Wade*, one or more of these issues may have to be considered on remand." (opinion, p. 4) Appellants Roemer and Guste have not challenged that conclusion by the district court. (Brief of Appellants at 3 n.1.)

The Supreme Court has never considered the applicability of sex-based equal protection doctrine to an abortion and contraception case, because it has decided those cases on privacy grounds. Although the parties represented by this brief agree with appellees that the Act violates the right to privacy, they believe that the Act also violates the equal *1229 protection clause. Thus, this Court should instruct the lower court, in the event of a remand, to conclude that the Act discriminates against the plaintiffs as women, because it violates the Fourteenth Amendment.

When a plaintiff challenges a measure on the ground that it constitutes gender discrimination, the Court first determines whether the plaintiff has established a prima facie case of gender discrimination. To establish a prima facie case, the plaintiff can establish that the legislature created a per se gender-based classification. See, e.g., [Mississippi University for Women v. Hogan](#), 458 U.S. 718 (1982). Alternatively, the plaintiff can establish that the legislature intentionally created a gender-based disparate impact. See, e.g., [Personnel Administrator v. Feeney](#), 442 U.S. 256 (1979).

In the present case, plaintiffs can establish a prima facie case of gender discrimination under either method of proof. The Act constitutes a per se gender-based classification, because it classifies on the basis of a trait -- pregnancy -- that, as a matter of biology, only women possess. Alternatively, the plaintiffs can demonstrate that the legislature intentionally harmed women by passing the Act, because the legislature knowingly created the maximum impact against women while regulating abortion and contraception.

If the plaintiffs can meet the intentional standard for disparate impact then they have necessarily met the per se standard. Accordingly, this brief will focus on the impact-*1230 intent standard while recognizing that the more lenient per se standard is

also available in the present case. [\[FN1\]](#)

B. The Act Produces Disparate Impact Against Women

A gender-based impact occurs in a pregnancy-related case when the government's policy burdens women rather than simply fails to benefit them. Thus, in [Nashville Gas Co. v. Satty, 434 U.S. 136 \(1977\)](#), the Court was able to conclude that the plaintiffs established a disparate impact, because the employment policy substantially burdened women's reproductive lives. [\[FN2\]](#) As then-Justice Rehnquist stated for the Court in *Satty*, a gender-based impact is established when the government "has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer." *Id.* at 142.

The Act, criminalizing abortion and many forms of *1231 contraception, produces a devastating, disparate impact against women. Women are the only group that will be substantially impacted by the Act. The purpose of the Act is to preclude the women of Louisiana from being able to terminate a pregnancy from the moment of conception. The statute intends to coerce nearly 17,000 women, who otherwise would choose to terminate their pregnancies through lawful and safe abortions, to undergo compulsory childbirth, self-induce an abortion, or seek an illegal abortion. Each of these alternatives would be very detrimental to the lives and well-being of the women in the state of Louisiana. In addition, the effect of the statute will be to ban many forms of contraception; each of the banned contraceptives are ones presently available to women, not men. More importantly, it is women, not men, who will face the burden of compulsory pregnancy that is the result of banning contraceptives. [\[FN3\]](#)

In [Webster v. Reproductive Health Services, 492 U.S. 490 \(1989\)](#), Chief Justice Rehnquist recognized that abortion regulations can have a dramatic negative impact on women's lives. Yet, he predicted that states would never again impose nearly absolute abortion restrictions on women:

*1232 The dissent's suggestion ... that legislative bodies, in a Nation where more than half of our population is women, will treat our decision today as an invitation to enact abortion regulations reminiscent of the dark ages not only misreads our views but does scant justice to those who serve in such bodies and the people who elect them.

Id. at 521.

Despite Chief Justice Rehnquist's prediction, the Louisiana legislature has responded to *Webster* by re-enacting its nineteenth century abortion statute. The nineteenth century is the dark ages for the women of Louisiana. Because the legislative process has consistently failed to protect the women of Louisiana, judicial intervention is needed to protect them. In particular, the women who are least well represented by the political process and who will be most impacted by the statute -- adolescent females, women with handicaps, and poor and minority women -- need to be protected.

1. Adolescent Females

The Act would disproportionately coerce pregnant adolescent females to undergo compulsory childbirth, self-induce an abortion or seek an illegal abortion, because they are unlikely to have the economic resources and knowledge to travel out of state to obtain a legal abortion. These results would effect large numbers of females, because, at present, females aged 18-19 year old have the highest rate of abortions of any age group. See Henshaw et al., *A Portrait of American Women Who Obtain Abortions*, 17 *Family Planning Perspectives* 90 (1985).

*1233 Studies have found that illegal abortion, rather than childbirth, is the most likely result in countries in which safe or legal abortions are not available. See Mashalaba, *Commentary on the causes and consequences of unwanted pregnancy from*

an African perspective, 3 *Int. J. Gynecol. Obstet.* 15, 17 (1989). The negative health consequences of illegal abortions would be dramatic for pregnant adolescents. "Complications include hemorrhage, puerperal infection, and abdominal perforations, which can lead to death, chronic morbidity, or secondary infertility." *Id.*

For those pregnant adolescent females who "choose" compulsory childbirth over illegal abortion, the negative health consequences would also be dramatic. They would be at an increased risk of developing gallstones, see Buiumsohn et al., *Cholelithiasis and Teenage Mothers*, 11 *J. of Adolescent Health Care* 339 (1990); of suffering the effects of an ectopic pregnancy, see Gale et al., *Tubal Pregnancy in Adolescents*, 11 *J. of Adolescent Health Care* 485 (1990); and of aggravating common pre-existing conditions such as asthma, see Apter et al., *Outcomes of Pregnancy in Adolescents with Severe Asthma*, 149 *Archives of Internal Medicine* 2571 (1989). Pregnant adolescents are also at a disproportionate risk of dying from a hemorrhage or miscarriage, and have a relatively high maternal morbidity and mortality rate. See Barnett, *Factors that Adversely Affect the Health and Well-Being of African-American Adolescent Mothers and their Infants in Teenage *1234 Pregnancy: Developing Strategies for Change in the Twenty-First Century* 101, 105 (eds. Jones and Battle 1990). The risk of health problems and medical complications are even higher for African-American adolescents. *Id.* at 106.

The long-term negative consequences of adolescent childbearing for young women include reduced educational attainment, lower earnings, increased risk of welfare dependency, greater marital instability, a more rapid pace of childbearing, and lower perceived personal efficacy. See Brazzell & Acock, *Influence of Attitudes, Significant Others and Aspirations on How Adolescents Intend to Resolve a Premarital Pregnancy*, 50 *J. of Marriage & Family* 413 (1988).

Female adolescents, themselves, are minors who do not have the right to vote. The Louisiana legislature has sacrificed their lives for the lives of embryos from the moment of conception.

2. Women with Handicaps

Coerced childbirth would substantially harm the health of many women with handicaps. Therapeutic abortions are routinely recommended for women with congestive heart failure, cyanotic congenital heart disease, primary or secondary hypertension, renal failure, kidney disease, or Eisenmenger Syndrome, because these conditions threaten a pregnant woman's health. See Elkayam & Gleicher, *Cardiac Problems in Pregnancy*, 25 *JAMA* 2838 (1989). Similarly, therapeutic abortions are generally recommended for pregnant women with breast cancer in *1235 Stage IV or V, so that they can receive the necessary treatment. See Onion, *Breast Cancer with Pregnancy*, 84 *Amer. J. of Nursing* 11- 26 (1984).

Coerced childbirth would also worsen the medical condition of pregnant HIV-positive women, because it would depress cell-mediated immunity, and thereby cause more rapid progression of HIV infection. See Koonin et al., *Pregnancy-Associated Deaths Due to AIDS in the United States*, 258 *JAMA* 2714- 17 (1987). Women in the later stages of HIV infection are more likely to experience severe pregnancy complications such as breech presentation or their own death. See Selwyn et al., *Prospective Study of HIV Infection and Pregnancy Outcomes in Intravenous Drug Use*, 261 *JAMA* 1289-94 (1989). Thus, the Centers for Disease Control recommends that HIV-infected women not become pregnant. See Grimes, *The CDC and Abortion in HIV-Positive Women*, 259 *JAMA* 1176 (1987).

Finally, pregnant women with pre-existing major psychiatric illness would not be able to receive adequate medical care if abortion were criminalized:

Psychiatrists are confronted with patients who have suffered major postpartum psychiatric decompensations after previous deliveries and who, at serious risk of recurrence, consult them for advice. Other patients suffer from chronic psychiatric diseases that make them unable to care for children.... The administration of psychotropic medication is another complicating clinical issue. Psychiatrists may, in emergency situations, prescribe agents with unknown or adverse effects on embryonic de-

velopment before a patient's pregnancy can be diagnosed.

Stotland, *Psychiatric Issues in Abortion, and the Implications* *1236 of Recent Legal Changes for Psychiatric Practice in Psychiatric Aspects of Abortion 1,13 (Stotland ed. 1991) [FN4]

Like adolescents, women with handicaps are a group that is poorly represented by the political process and needs protection from the courts to avoid being sacrificed for the lives of embryos from the moment of conception.

3. Poor and Minority Women

The Act would have a dramatic, negative impact on the lives of poor and minority women. At present, the highest legal abortion rate is among unmarried women under 30 who are nonwhite, nonHispanic, and who have a family income under \$11,000 per year. See Goldsmith, *Researchers Amass Abortion Data*, 262 JAMA 1431 (1989). Few abortion-related deaths presently occur. By contrast women of color accounted for 64% of the deaths associated with illegal abortions in this country in 1972. See Cates & Roachat, *Illegal Abortions in the United States: 1972-1974*, 8 Fam. Plan. Persp. 86,87 (1976). Mishandled criminal abortions were the principal cause of maternal deaths in the 1960's. See Niswander, *Medical Abortion Practices in the United States*, in *Abortion and the Law* 53 (Smith ed. 1967). The mortality rates for African-American women were nine times higher than for white women. See Gold, *Therapeutic Abortions in New York: A 20 Year Review*, *1237 55 Am. J. Pub. Health 964-65 (1965).

Poor and minority women, like female adolescents and women with handicaps, have been consistently ignored by the Louisiana legislature. This Court should not tolerate the callous indifference to their lives reflected by the Act.

C. The Louisiana Legislature Knowingly Caused Harm to Women in Passing the Act

Because the Act would have a dramatic gender-based impact on women's lives and well-being, this Court should conclude that this impact violates the Constitution so long as the adverse effects reflect an "invidious" purpose. *Personnel Administrator v. Feeney*, 442 U.S. 256, 274 (1979). As the Supreme Court said in *Feeney*, the "dispositive question, then, is whether the appellee has shown that a gender-based discriminatory purpose has, at least in some measure, shaped the [legislation]." *Id.* at 276.

Although the Supreme Court in *Feeney* did not find that the plaintiffs established a record of purposeful discrimination, [FN5] such evidence is readily available in the present case. The Louisiana legislature, unlike the legislature in *1238 *Feeney*, was repeatedly informed of the impact of this Act on women in the state of Louisiana at the time of its enactment. Yet, time and time again, the state refused to modify its absolute abortion ban to minimize the impact on women. It soundly rejected an amendment to provide an exception when a woman's health was endangered by her pregnancy, see Addendum A-1 (amendment rejected by a vote of 8-30); rejected an exception for women with AIDS, see Addendum A-2 (amendment rejected by a vote of 12-26); and rejected an amendment to increase welfare benefits to pregnant women, see Addendum A-3 (amendment tabled by a vote of 23-14). No justification except for an indifference to the lives and well-being of women could explain such actions. The state knowingly imprisoned these women to compulsory childbirth while shortening their lives.

II. Appellants Cannot Constitutionally Justify Their Discrimination Against Women

A. Introduction

If the plaintiff establishes a prima facie case of gender-based discrimination then the statute is unconstitutional unless the defendants can meet their burden of justification. The Supreme Court has held that the defendants must "carry the burden of showing an 'exceedingly persuasive justification'" in a gender-based equality case. [Mississippi University for Women v. Hogan](#), 458 U.S. at 724 (quoting [Kirchberg v. Feenstra](#), 450 U.S. 455, 461 (1981)). In assessing *1239 the stated justifications, the Court undertakes a "searching analysis", [Id.](#) at 728, of whether the restriction is, in fact, "substantially related to the statutory objective." [Craig v. Boren](#), 429 U.S. 190, 197 (1976). That statutory objective must be "important." *Id.*

Exacting as it is, this scrutiny escalates to the highest level where, as here, legislation that discriminates on the basis of gender also intrudes on bodily integrity, procreation, health, family, and life itself. See, e.g., [Skinner v. Oklahoma](#), 316 U.S. 535 (1942) (applying strict scrutiny under the equal protection clause to a compulsory sterilization law); [Zablocki v. Redhail](#), 434 U.S. 374 (1978) (applying strict scrutiny under the equal protection clause to a marriage restriction that discriminated against persons with outstanding child support obligations). See also [Thornburgh v. American College of Obstetricians & Gynecologists](#), 476 U.S. 747, 772 (1986) (recognizing importance of extending "private sphere of individual liberty" to "women as well as to men.") Because plaintiffs can prevail in the present case under the more lenient intermediate scrutiny, this brief will argue under that standard.

B. The Act is Not Substantially Related to Its Purported Objective of Protecting Life

If the state's objective were to protect life, then that objective would meet the requirement of being an "important state interest." However, the state did not have a genuine *1240 interest in protecting the lives of children or women. Instead, it was trying to coerce women to return to their nineteenth century exclusive roles of childbearer and caretaker of children.

Louisiana ranks nearly last in the United State in regard to the health and well-being of its children -- a situation that would be greatly exacerbated if the Act would go into effect. Senator Cleo Fields understood this problem and tried to persuade the legislature to modify the Act so that it would be able to better serve the women and children of Louisiana. He informed the legislature that Louisiana's infant mortality rate was 11.9% in 1987, one of the highest in the United States; that 8.7% of all babies that were born were low birth weight as compare to 6.9% nationally; and that 36% of Louisiana women received late prenatal care or no prenatal care at all, a condition that leads to high infant mortality and low birth weight. See Statement of Senator Fields before Louisiana Senate Committee on Health and Welfare at 49 (May 29, 1991).

Based on this testimony, Senator Fields was able to convince the Senate Committee on Health and Welfare to amend the Act so as to allow it to go into effect only when Medicaid eligibility for pregnant women and children was expanded. The Senate, however, stripped the bill of that amendment. See Official Journal of the Senate of the State of Louisiana 48-49 (June 3, 1991) (tabled by a vote of 34-14). See also Addendum *1241 A-3 (language of rejected amendment). Senator Field tried to reintroduce the amendment on June 4, 1991, when it was again tabled by a vote of 23-15. See Official Journal of the Senate of the State of Louisiana 14-15 (June 4, 1991). [\[FN6\]](#)

The Louisiana legislature was willing to shift the burden of compulsory childbirth on to women, as well as the enormous expenses of childrearing, but it was not willing to do anything meaningful to assist the children who would be born or to relieve women of childcare responsibilities. Those means are not pro-child or pro-life. [\[FN7\]](#) When stripped of their rhetoric, they are means designed to coerce women into resuming their traditional role of motherhood.

The irrationality and ineffectiveness of the Act becomes more apparent when one compares it to legislation passed elsewhere. Other states and other countries have sought to protect life, yet virtually no other jurisdiction in the western world has considered it necessary or appropriate to pass such a stringent anti-abortion measure in this century.

*1242 Within the United States, even before *Roe v. Wade* was decided, states were moving in the direction of liberalizing their abortion laws and breaking with the nineteenth century tradition of restrictive abortion laws. These more liberal laws contained numerous abortion exceptions and reflected an increasing respect for women's well-being. [FN8] See *Doe v. Bolton*, 410 U.S. 179, 182-83 (1973). [FN9] Louisiana, however, has never been willing to consider the importance of women's lives when regulating abortion.

Since *Webster* was decided, the overwhelming majority of states have not restricted abortion at all. Of the few states that have passed measures restricting abortion, they have created numerous exceptions. [FN10] If the means chosen under the Louisiana Act were closely tailored, then one must inquire why no other state in the last century has considered it necessary *1243 or appropriate to enact such a stringent measure even before *Roe v. Wade* was decided.

Although the appellants claim that the purpose of the Act is to protect the unborn child, it is not codified as part of Louisiana's Crimes Against Persons statutes. Instead, it is a part of the code that deals with public morality -- the part of the code that has historically restricted both abortion and contraception. As such, it reflects an attempt to resurrect nineteenth century views on public morality and women's place in society rather than a genuine concern for the person.

C. The Act is Based on Out-Moded and Stereotypical Views of Women

Appellants argue that their absolute prohibition of abortion stems from their civil law tradition. Brief of Appellant Connick at 25-28. That civil law tradition, however, is unconstitutionally based on out-moded and stereotypical views of women.

Under the Civil Codes of 1808, 1825, and 1870, women could not exercise political rights, vote or hold any elective office. In addition, they could not exercise any civil function unless specifically capacitated. See Saunders, Lectures on the *Civil Code of Louisiana 14 (1925)*. Married women had little capacity to act without the authority of their husbands. *Id.* at 33. It was not until 1979, under judicial mandate, that Louisiana drafted an equal management act to eliminate the "head and master" rule. See 1978 La. *1244 Acts No. 627, repealed by 1979 La. Acts No. 709 § 5 replaced by 1979 La. Acts Nos. 709, 710, 711. See also *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (finding Louisiana's "head and master" rule to be unconstitutional).

Most of western Europe shares this same civil law tradition. Yet, Europe has managed to adapt that tradition to the twentieth century by respecting women's well-being along with fetal well-being. See Cook, Abortion laws and policies: challenges and opportunities, 3 *Int. J. Gynecol. Obstet.* 61, 62-65 (1989). France, Louisiana's civil law ancestor, has a much less restrictive abortion law than Louisiana. [FN11] In addition, France has been the world leader in providing publicly funded abortion and contraception through the development of RU 486.

One obvious indication of the Louisiana legislature's stereotypical views of women reflected in the Act is its exemption of women who self-induce abortions from the statute's coverage. *La. Rev. Stat. Ann. § 14:87(A)(2)(1991)*. No justification consistent with the statute's purported objective can explain this exception. Self-induced abortions *1245 are likely to destroy both women and fetus' lives. On the other hand, such an exception supports a nineteenth century "pedestal" view of women by leaving them free from the criminal law.

Louisiana's traditional ideology that supports the Act is reflective of the ideology that has been found elsewhere to support abortion restrictions. Support for laws banning abortions have been found to be an outgrowth of stereotypical notions that women's only appropriate roles are those of mother and housewife; in many cases, such laws have emerged as a direct reaction to the increasing number of women who work outside the home. See generally Luker, *Abortion and the Politics of Motherhood* 192-215 (1984).

Louisiana cannot hide behind its civil law tradition to remain in the dark ages. The equal protection clause requires it to move its civil law tradition into a twentieth century understanding of women's rights and well-being.

The women of Louisiana would prefer to be represented by their legislature rather than turn to the courts for protection. Woman after woman testified before the Louisiana legislature about the dramatic negative consequences that would follow if the Act were enacted. Unfortunately, their efforts did not result in the legislature approving one meaningful exception to the Act. Until the women of Louisiana can gain access to the responsible state legislature that Chief Justice Rehnquist described in Webster, they will have *1246 to seek protection from the courts.

II. Conclusion

For the foregoing reasons, Amicus Curiae Supporting Appellees urge this Court to affirm the district court. Alternatively, this Court should instruct the district court, in the event of a remand, that the Act violates the equal protection clause of the Fourteenth Amendment.

Respectfully submitted,

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Supporting Appellees

The assistance of twenty-five students in the Tulane Law School Community Service Program is gratefully acknowledged.

***1247 ADDENDUM: TEXT OF SELECTED REJECTED AMENDMENTS**

Physical or Mental Health Exception

The physician terminates a pregnancy when the physical or mental health of the mother is seriously threatened by the pregnancy and prior to such termination, the physician prepares a report, and obtains the written concurrence of another physician, stating each reason which warrants the termination of the pregnancy.

Official Journal of the Senate of the State of Louisiana 19 (June 4, 1991) (rejected by a vote of 8-30).

***1248 HIV Exception**

The physician terminates a pregnancy when the mother has tested positive for the presence of the human immunodeficiency virus (HIV), which result has been confirmed by the second test, with each test being conducted by a laboratory approved by the Department of Health and Hospitals for such purposes, and prior to such termination, the physician prepares a report stating the reason which warrants the termination of the pregnancy.

Official Journal of the Senate of the State of Louisiana 14 (June 4, 1991) (rejected by a vote of 12-26).

***1249** Amendment to Increase Medicaid Eligibility

A. Upon receipt of the necessary waivers from the appropriate federal agency, which the secretary of the Department of Health and Hospitals shall request, the department shall amend the Medicaid state law to provide for:

- (1) Eligibility for Medicaid services for all pregnant women with an income up to one hundred eighty-five percent of the federal poverty income guidelines.
- (2) Medicaid eligibility for any pregnant woman who qualifies based on preliminary financial information indicating that her income and resources fall within the eligibility criteria and guarantee of payment for her services.
- (3) Eligibility criteria for Medicaid services for pregnant adolescents based on the income of the pregnant adolescent and not on the income of her parents.
- (4) A program of care coordination for all eligible pregnant women

B. In accordance with the Administrative Procedure Act, the department shall promulgate regulations requiring that all public health programs which render prenatal care services shall provide, at a minimum, for the following:

- (1) Expanded or flex-time hours of operation so that health care services are available to pregnant women during evening and weekend hours.
- (2) An initial appointment within two weeks of request and minimal waiting time to receive services after entering a health care facility.
- (3) Procedures to assure that pregnant women are receiving and continue to receive prenatal services.

....

Sections 2,3,5, and 6 of this Act shall become effective only if, as, and when the program provided in Section 4 of this Act is funded and implemented and in such event shall become effective on the first day of the calendar month after the department certifies to the governor and the legislature that the program is implemented.

Official Journal of the Senate of the State of Louisiana 48-49 (June 3, 1991) (tabled by a vote of 23-14).

***1250** Capital Punishment Amendment

to remove the imposition of capital punishment for the commission of any criminal offense

Official Journal of the Senate of the State of Louisiana 15 (June 4, 1991) (tabled by a vote of 29-8).

***1251** United States Court of Appeals For The Fifth Circuit

Sojourner T. et al., Plaintiffs-Appellees

-- versus --

Buddy Roemer et al., Defendants-Appellants

No. 91-3677

On Appeal From The United States District Court For The Eastern District of Louisiana

Motion for Leave to File Amicus Curiae Brief In Support of Plaintiffs-Appellees on Behalf of Black Women For Choice; The Community Relations Committee, Jewish Federation of Greater New Orleans; Louisiana Choice; Louisiana Psychiatric Association; Louisiana National Organization for Women; The New Jersey Women Lawyers Association; and the Women of Color Reproductive Health Forum

Black Women for Choice, et al., are organizations that will be substantially affected if Act 26 of the 1991 Louisiana Legis-

lature ["the Act"], criminalizing abortion and many forms of contraception, is allowed to go into effect. They move this court for leave to file an amicus curiae brief in support of plaintiffs-appellees which focuses on how the Act violates women's equality rights. In support thereof, amici state as follows:

*1252 (1) The groups participating in the amicus brief represent women of color, poor women, adolescent females, women with mental and physical handicaps, as well as other women inside and outside the state who will be substantially affected if the Act is found to be constitutional.

(2) Each of the groups participating in the amicus brief are committed to women's equality, and believes that women's equality will be undermined if the Act is found to be constitutional.

(3) The equality basis for overturning the Act was raised in the plaintiffs' complaint in the present case but has not been fully briefed to this Court in any of the briefs filed in this case.

(4) Because the equality issue is central to an understanding of the constitutionality of the Act, amicus curiae respectfully request permission to file their brief on the equality issue.

(5) The brief of amici curiae, which is attached to this motion, has been filed within fifteen (15) days of the filing of plaintiffs-appellees' brief, as required by Local Rule 29.

*1253 CONCLUSION

For the foregoing reasons, amici curiae respectfully request this Court to grant their motion for leave to file their brief in support of plaintiffs.

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[FN1] To the extent that [Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 \(1974\)](#) can be interpreted as rejecting the per se standard, it was wrongly decided and has been sharply criticized. See generally Law, [Rethinking Sex and the Constitution, 132 U. Pa. L. Rev. 955, 984 nn. 107-09 \(1984\)](#) (citing dozens of articles criticizing Geduldig). Reproductive issues are basic to women's well-being in society. Congress recognized this fact when it amended Title VII of the Civil Rights Act of 1964, [42 U.S.C. §2000e](#) et seq., (1991) to state explicitly that pregnancy-based discrimination constitutes sex discrimination. See [42 U.S.C. § 2000e\(k\)\(1991\)](#). This Court should defer to Congress' interpretation of sex-based equality, because section 5 of the Fourteenth Amendment explicitly gives Congress the power to enforce the Fourteenth Amendment.

[FN2] Although Satty involved an alleged violation of Title VII of the Civil Rights Act of 1964, [42 U.S.C. § 2000e](#) et seq., (1991) rather than the Constitution, the Court used the same analysis to determine whether a gender-based impact had been established as it would have in a constitutional case.

[FN3] Although amici agree with Appellees that the Act unconstitutionally bans many forms of contraception, this brief will focus on the impact to women of banning nearly all abortions. As this brief will demonstrate, banning abortion coerces many women to undergo compulsory childbirth, seek illegal abortions, or self-induce abortions with serious negative consequences.

By also banning many forms of contraception, the Act greatly magnifies the impact on women.

[FN4] The Louisiana legislature was made aware of these adverse effects on women with preexisting mental illness through the testimony of Dr. Helen Ullrich. See Testimony by Dr. Ullrich before Louisiana Senate Committee on Health and Welfare 38-39 (May 29, 1991).

[FN5] In Feeney, the Massachusetts legislature originally passed the veteran's-preference statute when men and women did not routinely compete for the same jobs. Id. at 255 n.14 (noting the standard practice of having jobs listed on a gendered basis until 1971). The legislature therefore conceived of its intent as assisting one group of men, veterans, over another group of men, nonveterans. Thus, the Court was not able to conclude from the facts in Feeney that the legislature consciously harmed women when it originally enacted the veterans preference statute.

[FN6] In addition, the legislature refused to improve the state's regulation of day care centers so that children could receive adequate day care and mothers could avoid some childcare responsibilities while maintaining employment or education. See La. H.B. 15 (1991) and La. S.B. 3 (1991). See also Day-care bill dealt a blow in the House, The Times-Picayune 1, col. 5 (August 1, 1991).

[FN7] The legislature also rejected an amendment that would have eliminated capital punishment in the state. See Official Journal of the Senate of the State of Louisiana 15 (June 4, 1991). (Tabled by a vote of 29-8). See also Appendix A-4 (language of amendment).

[FN8] Amici do not suggest that these laws were constitutional. Nevertheless, they reflected more consideration of women's well-being than Louisiana's virtually complete ban on abortion.

[FN9] The statute considered in Roe was not passed in the twentieth century. Like the Louisiana statute, it represents a nineteenth century understanding of women's role in society.

[FN10] The most restrictive post-Webster measure passed by a state has been the Utah statute which provides for an abortion exception in the event of rape or incest, grave damage to the woman's health, or grave fetal defects. Utah Code Ann. @ 76-7-302(2) (1991). Guam, which is a territory subject to the United States Constitution, has passed an abortion measure that is less restrictive than Louisiana's. See [9 Guam Code Ann. § 31.20 \(1991\)](#). Amici do not suggest that these statutes are constitutional. Nevertheless, they reflect more respect for women's well-being than the Louisiana statute.

[FN11] French law permits a woman to choose an abortion without restriction in the first ten weeks of her pregnancy; after ten weeks, an abortion is permitted when the pregnancy would seriously endanger a pregnant woman's health or the fetus is suffering from a particularly serious disease or condition. See 26 Intl Digest of Health Leg. 351-54 (1975). At no time during her pregnancy, does a woman in France need to demonstrate that her life was threatened by the continuation of her pregnancy in order to obtain an abortion.

*1255 Appendix B

Text of October 18, 1991 letter from Ruth Colker to Jeff Campbell,
Director, New Orleans AIDS (NO/AIDS) Task Force.

Dear Jeff:

I wanted to take a few minutes to communicate my disappointment to you and your Board over the resolution of your organization's participation in the amicus brief in *Sojourner T. v. Buddy Roemer* (the Louisiana abortion case).

When I initially sought your organization's participation, I understood that your Board might vote not to participate. Although I would have been disappointed, I would have respected that decision given the difficult nature of the abortion issue. The way the issue ended up being ultimately resolved, however, disappointed me much more. I would therefore like to share that disappointment.

I deliberately wrote the brief as a "moderate" abortion brief. It takes no position on the issue of what would be a constitutional abortion statute, except to argue that the absence of a "health" exception definitely makes the statute unconstitutional. I therefore focused on the health implications to various subgroups of women-adolescent females, women with physical and mental handicaps, and poor and minority women. Within the category of women with physical and mental handicaps, I focused, in particular, on women with HIV infection. The health implications that I discussed for each subgroup were quite dramatic-shortened life expectancy and serious infringement on health. Those effects were no more or less dramatic for women with HIV infection than for the other subgroups of women described in the brief. A shortened life is a shortened life.

When I circulated the brief to other community groups, they usually responded by giving me more examples of these health implications for their community, e.g., kidney and renal failure or complicating effects of drugs used to treat psychiatric illness. These comments were very helpful to me in revising the brief since, as a lawyer, it is hard for me to keep abreast of all medical issues relating to pregnancy.

The response by the NO/AIDS Task Force, however, is markedly different. Rather than suggesting how I could have better or more accurately discussed the implications of the abortion statute on women with HIV infection, the Task Force chose to limit its endorsement of the brief to the particular paragraphs referencing women with HIV infection. As I told you over the telephone, that limitation was not acceptable, because of the negative implications that it cast on my other clients-suggesting *1256 that their health problems were not obviously as dramatic and therefore deserving of the court's and legislature's attention.

The reason that I find the Task Force's response so unsettling is that it was actually being asked to do very little-simply agree that the health of women with HIV infection is implicated by compulsory pregnancy in a way that is comparable to that of other women. Nevertheless, it was not willing to stand beside its sisters in that way.

I have heard two comments recently which underscore the unacceptability of the Task Force's actions. First, on a T.V. show concerning gay and lesbian rights, a member of the audience had commented that "homosexuals" were immoral and that God had therefore responded to their immorality with the AIDS epidemic. A lesbian on the show responded that then God must much favor lesbians since (ignoring the CDC's [Center for Disease Control's] absurd definition of lesbianism), lesbians had a very low incidence of AIDS. The member of the audience responded by saying that he had not intended to direct his comment against lesbians; it would be fine if we shipped only gay men off to concentration camps. The lesbian then responded that, no, if gay men were sent away, she would insist upon going with them. In the present context, this response does not seem to have been reciprocated. So long as women with HIV infection are not harmed by the state's abortion statute, the Task Force is seemingly willing to permit other women's health to be harmed by the statute.

Second, Sandy Lowe, staff attorney for the Lambda Legal Defense Fund, recently spoke at Tulane Law School. In a passing reference, she asked how the gay male community would have responded if it were lesbians, not gay men, who were first inflicted with the AIDS virus. The response of your organization to participating in this brief makes me shudder to consider what those consequences might have been.

As you know, even before women began to focus on the HIV implications on women, women have been very active in the AIDS movement. If it were not for women's early participation in the AIDS movement, we probably today would not have so

much attention on the definition of AIDS and how that negatively impacts women. Nor would we have so much attention focused on the special problems of pregnant women with AIDS. Women were willing to make the connection from their civil rights concerns to that of AIDS in becoming involved in the movement at an early stage. It is extremely disappointing to see the AIDS movement (or a particular AIDS service organization) not willing, at all, to make a reciprocal gesture.

***1257** I understand that your organization is probably repeatedly requested to align itself with other organizations and that, on some occasions, those alignments may cause political and funding difficulties. However, I wonder what it means when an organization becomes so well-funded and acceptable politically that it turns its back on its sisters who helped it gain that stature in the community. I will be watching the NO/AIDS Task Force quite closely in the future to see whether I can support it financially and politically. Success, in the case of the NO/AIDS Task Force, seems to have had serious negative implications.

When the Sojourner T. case reaches the United States Supreme Court, I plan to repeat my efforts at getting community groups to collaborate on a similar brief. I will be back in touch with you at that time and hope that, by then, the Task Force has rediscussed this issue and modified its policy accordingly.

Sincerely yours,

Ruth Colker

Professor of Law

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