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*1273 THE PRACTICE OF THEORY
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It is common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it? To be good in theory but not in practice posits a relation between theory and practice that places theory prior to practice, both methodologically and normatively, as if theory is a terrain unto itself.... The closest most legal academics come to practice is teaching-their students, most of whom will practice, being regarded by many as an occupational hazard to their theorizing.

Catharine MacKinnon [FN1]

I. INTRODUCTION

In this essay, I will discuss how we as feminists can apply our theory to practice. Rather than assume, however, that process requires us to modify our practice to fit our theory, I will assume the opposite. I will ask how my experience with the practice of law should require me to modify my feminist-theological theory of law, which I will describe below. I will suggest that we must constantly watch the effectiveness of our preconceived ideas. I will take my lead from Catharine MacKinnon, quoted above.

At the outset, I think it is appropriate to describe the key elements of the theory that I bring to my practice of law. I consider myself to be a religious-feminist, which, for me, means many things. First, although I recognize that religion has played an important role in the subordination of women, I also believe that the aspirations for society found in various religions can contribute to feminism. [FN2] Thus, I am interested in working in coalition with religious communities rather than assuming that their interests are opposed to ours as feminists. Second, I believe in the importance of participating in a transformative dialogue to move society to our *1274 highest aspirations for ourselves. [FN3] Rhetoric, in my view, rarely enhances dialogue. Third, I believe in the importance of developing community-based aspirations for ourselves, rather than individually-based aspirations. In other words, I do not recognize a separation between self and other; I therefore think in terms of the community, which includes the self in its relationship to others. [FN4] Doctrinally, that belief transforms itself into use of equality doctrine rather than privacy doctrine, as much as possible. [FN5] Fourth, I recognize that our society rarely respects the well-being of women and that good faith dialogue is not possible in a community in which respect for women is not present. [FN6] This recognition adds the most difficult dimension to my three previously articulated views because each of those views is, in some way, premised on the possibility of good faith dialogue. I therefore constantly struggle with how much the daily violence and disrespect that women face in our lives require us to respond rhetorically rather than dialogically, even though I believe that rhetoric is ultimately of limited utility.

I have discussed many of these ideas in various law review articles and in a recent book. [FN7] Most notably, I raised many of these ideas in an article that I wrote for the Harvard Women's Law Journal in which I criticized other feminists for not
writing sufficiently feminist amicus briefs in the Webster case. [FN8] Appropriately, I was criticized for being overly naive in my views; my critics argued that good faith dialogue is not possible in a community in which violence against women is prevalent [*1275] and that privacy arguments rather than equality arguments are essential to preserve women's reproductive freedom. [FN9] These comments made me wonder whether my experience of practicing law should require me to modify my theory to make it more practical. The following examples will suggest the extent to which my theory probably needs to be modified.

II. NEW ORLEANS GAY RIGHTS ORDINANCE

My work on the New Orleans Gay Rights Ordinance [FN10] began in 1986 when two other lawyers and I drafted an ordinance to be presented to the New Orleans City Council. I soon learned that our chief opposition would be the Catholic Church and the religious fundamentalist communities. The other lawyers were not willing to work with those groups to achieve a compromise; I was. Several gay rights activists including myself met with the Archdiocese and discussed the value of their AIDS work. We stressed how important it was that the Church not be perceived as being against the ordinance (as they had been two years previously) in order to maintain community support for its AIDS work. The Church agreed neither to endorse nor to fight the ordinance. Unfortunately, it did not honor its promise. A Church lobbyist was at the City Council every day lobbying individual council members to oppose passage of the ordinance. The ordinance was defeated soundly.

Five years later, I was again asked to work with two other lawyers to draft an ordinance to be presented to the City Council. Remembering the problems of the previous attempt, I did not assume that we could work with the Church in good faith. I also did not believe that the content of the ordinance was very important; its passage was most critical on a symbolic level. I therefore drafted language that would exempt all religiously-based institutions from coverage by the ordinance. If they were not covered, I concluded that they would not fight it. [FN11] It passed by the same proportion that it had lost in the previous attempt despite the fact that little change had occurred in the composition of the Council. [FN12]

My theory said that the Church could be trusted to act in good faith. My practice showed that the New Orleans Archdiocese could not be trusted. I did not give them another chance to harm us; instead, I worked around them. The result is less than what the gay rights activists who had worked for years to pass an ordinance wanted. (One lawyer refused to work on the ordinance with the religious exemption.) Is a weak ordinance better than no ordinance? In my opinion, yes; in the opinion of others, no. [FN13]

The impact on my theory? Theoretically, I would have preferred to have given the Church another chance to work with us. I would have liked to believe any assurances that they would have provided. But, in practice, there was a way around dialogue-avoidance, although it required weakening the Ordinance. In the past, I thought that there were two major options-dialogue or rhetoric. I have made passing references to the possible role of silence. [FN14] But avoidance needs to be added to my repertoire. By working around an organization rather than confronting it, we may avoid some of the disadvantages of rhetoric without actually achieving dialogue. It turns out that my practice was less bipolar than my theory; my practice enabled me to discover alternative routes that my theory had not yet contemplated.

*1277 III. Louisiana [FN15] and Mississippi [FN16] Abortion Cases

(Fifth Circuit)

The Louisiana anti-abortion statute contains several key elements which, in my view, make it the harshest in the country. First, the Legislative Findings and Purpose expressly state that the state's interest is to protect "the life of the unborn from the time of conception until birth [to the greatest extent possible]." [FN17] Second, the statute 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 abortion is performed "to preserve the life or health of the unborn child or to remove a dead unborn child."
pregnant woman, (c) the abortion is performed upon a victim of rape or incest, where that victim has complied with numer-
ous reporting requirements within one week of the alleged rape, or (d) the abortion is performed upon a victim of incest,
provided the incest is reported. [FN18] The statute defines conception as the "contact of spermatozoan with the ovum" but
does not define pregnancy. [FN19] In addition, the woman who has the abortion is not subject to punishment. [FN20]

The Louisiana statute contains no meaningful abortion exceptions—a woman has to be on the verge of death in order to pro-
cure an abortion. The sloppy language of the statute also suggests that many forms of birth control would be prohibited, since
the statute purports to ban all devices that would terminate a pregnancy from conception (such as a low-dose birth control pill
or I.U.D.). No other state has passed a statute without a health exception and without explicit recognition that birth control
would remain lawful. [FN21]

The Mississippi anti-abortion statute [FN22] is a more moderate statute than the Louisiana anti-abortion statute, although its
impact on the women of Mississippi will be dramatic. Like the statute affirmed in relevant part in Planned Parenthood v. Ca-
seyc, [FN23] it imposes a twenty-four hour *1278 waiting period and an informed consent requirement. Unlike the
Pennsylvania statute, however, it contains a very limited medical emergency exception that requires a woman's pregnancy to
pose a "grave peril of immediate and irreversible loss of major bodily function" [FN24] for a physician to waive the twenty-
four hour waiting period requirement. Moreover, Mississippi, unlike Pennsylvania, is the poorest state in the United States
with a very inadequate health care system. I was therefore very concerned about the impact that the waiting period require-
ment would have on women in Mississippi. In the Mississippi case, the district court judge had enjoined the enforcement of
the statute after a multiple-day hearing in which much of this impact was put into the record. [FN25]

Theoretically, I believe that abortion statutes impact most starkly on the most disadvantaged women in our society, particu-
larly adolescent females, poor women, minority women, and women with handicaps. From an equality perspective, I believe
that disadvantaged women cannot afford to be left alone in their reproductive lives—they need the state to make abortions
available under Medicaid; they need public hospitals to provide abortion services along with other reproductive services; and
they need the state not to impose financial barriers to abortions through waiting periods, hospitalization requirements, and
physician-monitored informed consent. In my view, our abortion doctrine under Roe [FN26] is too often premised on a white
adult able-bodied, middle-class woman who can afford to purchase reproductive services, including abortion.

By focusing on disadvantaged women and equality arguments in my briefs opposing the Louisiana and Mississippi statutes, I
wanted to make disadvantaged women, rather than privileged women, the core of our abortion doctrine. We can take that step
by placing the lives of disadvantaged women on the pages of briefs that are filed in court. That was my intention in both the
Louisiana and Mississippi cases. I have written a great deal about the abortion issue but, until those briefs, had never prac-
ticed in this area of the law. The briefs therefore represented an opportunity to see how well my theory worked in practice.

*1279 Practically, it is difficult to be successful under an equality perspective. Two major stumbling blocks exist—the Su-
preme Court's decisions in Geduldig v. Aiello [FN27] and Personnel Administrator v. Feeney. [FN28] In Geduldig, the Court
held that pregnancy-related restrictions are not per se gender-based restrictions that would entitle the petitioner to heightened
scrutiny. [FN29] Many feminists have challenged the Geduldig decision, arguing that it is absurd not to view pregnancy as a
sex-based classification. [FN30] In Feeney, the Court held that a petitioner can obtain heightened scrutiny through evidence
of a gender-based impact (rather than a gender-based classification) only if she can also demonstrate that the legislature
passed the legislation because of rather than despite its impact on women. [FN31] Virtually no cases have been successful
under this stringent requirement.

Although I agree that Geduldig was wrongly decided and should not preclude a petitioner in an abortion case from receiving
heightened scrutiny, I chose not to challenge Geduldig in the Louisiana case. Instead, I chose to pursue the more difficult task of meeting the impact-intent standard that was set forth by the Court in Feeney.

Theoretical and practical reasons led to my decision to apply the Feeney standard to the Louisiana statute. Theoretically, I believe that feminists have focused too exclusively on Geduldig without pursuing the possibilities under a Feeney approach. By using the Feeney standard, I hoped to turn its doctrinal problems into an advantage. The Feeney standard is problematic because it requires the plaintiff to prove that the legislature intentionally created the disparate impact against women. Typically, that is a very difficult standard of proof. In the Louisiana case, however, strong evidence existed that the legislature knowingly harmed women's well-being through enactment of the anti-abortion statute. I wanted to put that 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 that we had a case of per se gender-based discrimination, I decided to use the Feeney burden of proof directly. Although many people might say that meeting the Feeney standard is extremely difficult, I welcomed the opportunity to meet that standard of proof given the evidence that I had available.

Despite my broad theoretical statements about the importance of using the Feeney approach and the undesirability of challenging Geduldig, I would not make the same judgment in all abortion cases. I wrote the first draft of the Mississippi brief under the Feeney standard, but as my co-workers at the NAACP LDF and Planned Parenthood suggested, it was not a very convincing argument. Mississippi does not keep very good records of its legislative history, which made it nearly impossible to establish intent. Because such evidence of intent was not clearly present in the Mississippi case, I chose to distinguish Geduldig. Nevertheless, even in the Mississippi case, I set up the doctrinal framework such that I had the opportunity to discuss extensively the impact of the statute on disadvantaged women. Thus, I learned from working on both the Louisiana and Mississippi cases that I did not have to view the choice between the Feeney and Geduldig standards as dictating whether I could describe the impact of the statute on disadvantaged women. The impact could be described under either standard if I were committed to finding a way to do so. Practical considerations made me be more flexible and see the array of doctrinal options available to me.

Another decision that I faced was how rhetorical to allow my writing style to be. I tried to make it less rhetorical by not challenging the legitimacy of the state's valuing prenatal life. However, it was easy to show in both cases how inauthentic was the state's recitation of this interest. Nevertheless, I may have underestimated the need to argue rhetorically. I like to think of my audience as acting in good faith, respecting the views of my clients even though they may disagree. In the Mississippi case, however, I got a good lesson in how naive is such a view. The appellants challenged our filing of the amicus brief in the Fifth Circuit in the Mississippi case. I did not take their challenge too seriously, not imagining that a court would not allow us to file our brief. I saw the problem as being listened to, rather than being allowed to be heard at all. Judge Edith Jones decided to admit our brief in the record, but said that it was open to reconsideration by the entire panel—an unprecedented step for her to take. As I understand the Fifth Circuit rules, we were entitled to a decision on whether our brief was entered; a conditional order is not contemplated under the rules. Thus, I learned that I probably should have taken their opposition more seriously and not assumed that the court would consider their opposition to be frivolous. In these conservative times, no opposition to our views, however, absurd, seems to be frivolous.

IV. LOUISIANA ABORTION CASE (STATE COURT)

This case came to me through a former student, Vince Booth. Vince *telephoned me to say that he had volunteered to work on an ACLU case and that the ACLU had recommended that he get in touch with me for assistance. He had a juvenile client who wanted an abortion. She had gone to a local judge for the bypass procedure, as required by state law. The judge had appointed a lawyer to represent the fetus and had allowed that lawyer to subpoena a witness, the purported father of the fetus. Fortunately, the judge also called the ACLU and asked them to find an attorney to represent the juvenile. The local
ACLU office has no staff attorney; the director called people on her list of volunteers and came across Vince Booth. Vince had never done any abortion work; most of his knowledge on the subject came from my constitutional law class several years before.

By the time Vince talked to me, the case was headed to the state court of appeals. The trial court judge had denied Vince’s objections to the appointment of counsel and the subpoena of a witness. The court of appeals quickly denied Vince’s request for a supervisory writ. It was then Friday, and Vince had filed a petition in the Louisiana Supreme Court. We spent the weekend writing a brief for the Louisiana Supreme Court. Because Louisiana state law tracks Roe and its progeny, we simply cited the federal case law and said that it was the law in Louisiana. There was no federal case law on the appointment of counsel to represent the fetus or the subpoena of witnesses. But we emphasized that the United States Supreme Court had said that the proceeding must be confidential and that those two steps violated our client’s confidentiality. The argument was a straightforward privacy argument and an extremely individualistic one. Vince actually asked me about making an equality argument (an age-based argument), and I told him that there was no point in doing so. We had a very strong case under privacy doctrine; our client needed an immediate ruling which could be most readily obtained on settled law.

Four judges heard our case in the Louisiana Supreme Court. By Monday afternoon, we heard that we had won by a three-to-one vote. Even a conservative Catholic voted with us.

As much as I have written on the futility of privacy doctrine, I did not hesitate to use privacy doctrine in this case. Two key factors influenced my decision. First, there is a big difference between direct client representation and amicus representation. By writing amicus briefs, I can show the court alternative ways to reach a particular decision. I know that the more settled ways will be discussed in the parties’ briefs. In this case, I had the responsibility of writing the sole brief. Once I made the decision to accept the case, I made the decision ethically to make whatever arguments were necessary to win. My key responsibility was to my client, not to a particular theory of law. My client wanted an abortion; she didn't care what arguments were made to get it. Second, equality arguments are superior to privacy arguments when they both have an equivalent chance of succeeding. When I have criticized others for not making equality arguments in abortion cases, I have done so in a context in which privacy arguments have little chance of working. Under Louisiana state constitutional law, that is not true. The Louisiana constitution has an embedded privacy provision; there is a very solid foundation for such an argument. [FN34]

I have not abandoned, however, the idea of making equality abortion arguments in Louisiana. Louisiana also has a sex equality provision in its constitution which has never been interpreted. If the federal courts uphold the state abortion statute, I welcome the opportunity to make an equality argument to our state courts when the case proceeds on that track. At that time, however, others will also be making the privacy argument. I will not be singly representing the women of Louisiana.

The lesson for me in this case is that perhaps I should not be so quick to criticize others directly representing clients for making strategic arguments that have a good chance of prevailing. The kinds of arguments that I prefer to make are best made in an amicus setting. Many and varied voices should be heard in the litigation process; I should be more open to recognizing the utility of these many and different voices.

Schematically, it might be best to think of cases as ranging from emergency situations to broad class actions in which the parties are contrived to create a lawsuit. Our responsibilities to our client may vary accordingly. In an emergency situation like the one that I faced in this case, a very pragmatic, utilitarian response may be appropriate. However, in an amicus setting, where I may seek clients, the kind of creative and theoretical arguments that I made in Louisiana and Mississippi may be more appropriate. Rather than having one style of argumentation for all circumstances, we need to have many different arguments available, depending upon the circumstances.
Nevertheless, I should note it is not clear what category this case fits into—an emergency or a contrived class action. My client did not have to get permission from an Orleans Parish judge to obtain an abortion. She could have filed her bypass request in Jefferson Parish where the judges do not appoint counsel to represent the fetus. (I made sure that my client was informed of that fact.) The real benefit in going to the Louisiana Supreme Court on an emergency basis was to prevent this practice from happening to other female adolescents who were not eligible to file in Jefferson Parish. [FN35] My case was not a pure emergency; in some ways, I was using my client to set up a case on behalf of other adolescents in Louisiana. But I chose to treat it like an emergency because I did not know when we might again have a chance to challenge the practice of appointing counsel to represent the fetus in Louisiana state court. This practice had been occurring for nearly a decade and had never been challenged because no one heard about the appointments of counsel until the cases were already complete. Thus, it is not even easy to distinguish an emergency from a contrived class action lawsuit; a particular case may fit both those categories. At bottom, our pragmatic judgment must prevail, even though it may not be easily schematized into a nice theoretical framework.

V. CONCLUSION

I am pleased that I practice law and write feminist theory. Practicing law keeps me in touch with the limitations of my theoretical perspective. Writing feminist theory has enabled me to see the limits of practicing law.

My experience with the New Orleans Gay Rights Ordinance made me consider more than the possibilities of dialogue and rhetoric. I learned that avoidance is a useful technique for advancing a political agenda. I learned that my thinking about dialogue and rhetoric may have been too bipolar, preventing me from seeing the usefulness of other tools, such as avoidance.

Working on the Louisiana and Mississippi anti-abortion cases also helped me see that I was too rigid in considering how to make equality arguments in abortion cases. I thought that one could only enter evidence concerning the impact of statutes on disadvantaged women by proceeding under the Feeney standard. My practice, however, taught me how to talk about disadvantaged women under the Geduldig test. Working on these cases also confirmed that one can be more dialogic in writing briefs than is traditional in abortion cases by acknowledging the legitimacy of the state's asserted valuation of life. On the other hand, I learned that the state is unlikely to be genuinely concerned with the value of life when it restricts abortions.

Finally, my experience in direct client representation in the Louisiana juvenile abortion case made me see the limited utility of my theoretical perspective when I participate in a case as the sole lawyer for a client rather than as an amicus. In the future, I will probably be more sympathetic to the difficult doctrinal choices that lawyers must make in representing clients and not expect theoretical consistency in those choices.

My practice has therefore forced me to emphasize the fourth prong of my theory—the short-term observation that good faith dialogue is not possible in our present society because it does not respect women. It is not possible to achieve my long-term goals of good faith dialogue until respect for women is more prevalent in society; I cannot practice law under the false assumption that such good faith dialogue exists. Thus, my practice of law must often be argumentative rather than dialogic because the preconditions for good faith dialogue do not exist in our society.

In thinking back over my last year of litigation, I see the real challenge as figuring out how to move from the short term to the long term. Both my Mississippi and Louisiana federal cases were attempts to move to my long-term goals by making arguments quite compatible with my theoretical perspective. The Gay Rights Ordinance and the Louisiana state case were attempts to achieve a concrete victory in the short term but at a price that may be inconsistent with my long-term views. I still have serious doubts about those short-term strategies; I wonder what I have genuinely accomplished. The challenge for me in the future will be to try to find more consistency between my short-term and long-term views. It is my long-term rather than

short-term views that may need to be modified.

My willingness to modify my long-term goals to accommodate my short-term practice of law provides me with a perspective somewhat different from Professor Jennifer Nedelsky's. [FN36] Professor Nedelsky insists that we choose short-term strategies that are consistent with our long-term goals. [FN37] By contrast, I suggest that we modify our long-term goals to meet our short-term strategies. The reasons for this difference in perspective, I suspect, are two-fold. First, and most important, Professor Nedelsky lives in Canada where the preconditions for good faith dialogue about women's role in society are more prevalent than in the United States. Thus, she can hope to be reasonably effective if she works in concert with her long-term goals. Second, Professor Nedelsky does not practice law. She therefore does not have to make her arguments within the tight constraints of the American judicial system. Instead, she argues in a more flexible political arena where good faith dialogue may be more possible than in the courtroom. The differences between Professor Nedelsky and me may therefore be differences of culture and experience, which demonstrates that our theory must always be contingent upon our lived realities. Living in different environments, our theories reflect a different *1285 accommodation between the long term and the short term. For both of us, however, I would hope that Professor MacKinnon would agree that our feminist theory is good in theory as well as in practice.

[FNa], Professor of Law, University of Pittsburgh; Professor of Law, Tulane University (1985-1993). I would like to thank the participants at the 1992 Northwestern University School of Law Feminist Symposium and the faculty at Southern Methodist University Law School for their helpful comments on an earlier version of this Essay. In particular, I would like to thank Nicole Kelsey and Lisa Mueller for organizing the Feminist Symposium and for making it possible for me to attend.


[FN4] The birth of my daughter has enhanced this belief. As a mother who breast-feeds, I feel no separation between my daughter and me. I am as aware of her growing hunger as is she. This experience makes me wonder if a society of women would be as individually-based as that of our own. It seems to me that only a class of people who do not experience childbirth could create a legal system premised on our separation rather than our connectedness to each other. This is not simply a biological argument; the experience of child rearing is one of connectedness for whomever engages in that process-men or women. Breast-feeding is simply the most obvious and stark example of that connectedness. I would suspect that my husband, who stays home with our child, feels as connected to her as I do despite the obvious fact that he cannot breast-feed her.

[FN5] I do not consider a woman's right to choose an abortion to be principally an argument for women's personal autonomy; instead, I see it as an argument for women's equality in this particular society at this particular time in history. In other words, restrictions on women's reproductive freedom are unacceptable because they reflect society's disrespect for women's position in society. That fact can best be seen by generally viewing restrictions on abortion within the context of contemporary reproductive health policy in the United States. See Ruth Colker, An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class, 1991 DUKE L.J. 324, 353-63.


[FN11] The language that I suggested was broadened so that all non-profit organizations were exempted. The ordinance does not apply to: "any religious corporation, religious entity, religious association, or religious organization, or any non-profit corporation, or organization or group, including charitable organizations, with respect to the employment of individuals, or with respect to the employment policies, practices and procedures established by any such corporation, entity, association, or society." Id. § 40C-122(d).

[FN12] The reasons for passage go beyond the addition of the religious exemption. David Duke's candidacy for governor probably made some council members afraid to take the side of bigotry by opposing the ordinance. In addition, Magic Johnson's announcement that he was HIV positive influenced at least one council member to vote for the ordinance (despite the fact that Johnson claims to have acquired the virus through heterosexual transmission and the ordinance was not about AIDS).

[FN13] After I presented this paper at Northwestern University School of Law, one member of the audience came up to me and said that he disagreed with my decision to favor the religious exemption. He said that no one would expect a race anti-discrimination statute to contain a religious exemption; thus, we should not tolerate such an exemption for a sexual-orientation nondiscrimination statute. I responded that his assumption was not so obvious in New Orleans and Louisiana where religion plays a dominant role in society. For example, our day care regulations exempt religiously affiliated day care centers from coverage despite the fact that there is no reason to assume that a religious institution provides safer or more sanitary day care than others. His comments, however, made me realize that my decision to favor the religious exemption was extremely contextual, dependent on the unique circumstances of politics in New Orleans and Louisiana. In many other communities, I may have agreed with him that such an exemption was not tolerable.

Events following the passage of the Gay Rights Ordinance support the view that the compromise statute was worthwhile. For example, New Orleans recently passed a "Mardi Gras" ordinance which prohibited Mardi Gras krewes from discriminating in their membership practices if they wanted a Mardi Gras parade permit. Sexual orientation was included as one of the grounds of nondiscrimination. Although the Mardi Gras Ordinance has been controversial, the sexual orientation nondiscrimination provision has received little public attention (the gender nondiscrimination provision proved to be the most controversial). Thus, the passage of the Gay Rights Ordinance may have acclimated the community to the acceptability of prohibiting discrimination on the basis of sexual orientation, thereby causing it not to be a major issue when it re-emerged in the context of another ordinance.

[FN14] See COLKER, supra note 7, at 32 (referring to the value of ignoring hostile comments to preserve our personal safety).

When Louisiana passed its abortion statute during the summer of 1991, I immediately called the local ACLU affiliate and offered my assistance at the trial court level. My services were not needed at that level; a federal district judge quickly granted the plaintiff’s request for an injunction and the case went to the Fifth Circuit. Sojourner T v. Roemer, 772 F. Supp. 930 (E.D. La. 1991), aff’d sub nom. Sojourner T v. Edwards, 974 F.2d 27 (5th Cir. 1992), cert. denied, 113 S. Ct. 1414 (1993). After the trial court rendered its decision, I called the ACLU and renewed my offer to assist. This time I suggested that I write an amicus brief for the Fifth Circuit focusing on the ways that this statute would impact disadvantaged women in the state. Moreover, I suggested that I write the brief from an equality rather than a privacy perspective.

By contrast, the Pennsylvania statute provided a medical emergency exception when a delay “will create serious risk of substantial and irreversible impairment of major bodily function.” 18 Pa. Cons. Stat. Ann. § 3203 (Supp. 1992). The imminence and loss of major bodily function requirements in the Mississippi statute more substantially restrict a physician’s judgment in treating a woman whose pregnancy poses health dangers than the Pennsylvania statute’s requirements.

Barnes v. Moore, No. J91-0245(W) (S.D. Miss. Aug. 30, 1991) (order granting preliminary injunction) (Judge Wingate). I did not get involved in the case until it was on appeal to the Fifth Circuit. Planned Parenthood contacted me and asked me if I would write a brief, like my Louisiana brief, which represented disadvantaged women in Mississippi. The brief was due on February 19th, and my baby was due on February 20th, so I said that I would work on it as much as possible. Cara cooperated by not being born until February 20th, so I was able to write the brief with some logistical help from Planned Parenthood and the NAACP Legal Defense Fund (LDF).


Geduldig, 417 U.S. at 496-97.

Although we ultimately lost the Mississippi case in the Fifth Circuit and won the Louisiana case, I do not think that the different results are attributable in any way to my decisions about how to describe the impact on women doctrinally. Instead, they can be explained by the Fifth Circuit's conclusion that the Mississippi statute is similar to the statute affirmed, in part, in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992), and that the Louisiana statute is more stringent than the Pennsylvania statute.

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

Since taking this case, I have wondered whether I could have handled this case more consistently with my theory. Arguably, as one member of the SMU faculty suggested, I could have interviewed the client before accepting the case and satisfied myself that she was not trying to further an individualistic, private sense of self that I might find objectionable. In this case, I never met my client; Vince handled all the daily contact with her. But even if I had met her, I am not sure that it would have been appropriate to interview her to satisfy my own set of values and aspirations. The interview itself may have become a part of her subordination in society. If I believe that the law should better respect women's ability to make both pro-choice and pro-life decisions, then I, as the pregnant woman's lawyer, should also respect her ability to make such decisions without subjecting her to needless interrogation.

A female adolescent could file for a bypass procedure in the parish in which she lived or the parish in which she sought to obtain an abortion. Thus, an adolescent who lived in Orleans and sought an abortion in Orleans would have had no choice but to file in Orleans Parish. My client could have filed in Orleans Parish or Jefferson Parish because she lived in one parish and sought the abortion in the other.


Id.

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