UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

LINDA FAY WEEKS, Wife of Gary Albert Raimer and GARY ALBERT RAIMER, on behalf of themselves and other similarly situated, Plaintiffs, v. HON. HARRY CONNICK, District Attorney of the Parish of Orleans; HON. WILLIAM J. GUSTE, Jr., Attorney General of the State of Louisiana and DR. WILLIAM H. STEWART, Director Health and Human Resources Administration, Defendents.	Civ. No. 73-469 Section "F" **BRIEF OF AMICI CURIAE NATIONAL ABORTION RIGHTS ACTION LEAGUE AND FIFTEEN OTHER ORGANIZATIONS IN SUPPORT OF PLAINTIFFS**

(Caption continued on inside front cover)

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CALVIN JACKSON, M.D. AND DELTA WOMEN'S CLINIC, INC., Plaintiffs, v. WILLIAM J. GUSTE, Jr., Attorney General of Louisiana; CHARLES B. ODOM, M.D., LOUISIANA STATE BOARD OF MEDICAL EXAMINERS; HARRY CONNICK, District Attorney; WILLIAM H. STEWART, M.D., HEALTH AND HUMAN RESOURCES ADMINISTATION, individually and in their official capacities, Defendants.	Civ. No. 74-2425 Section "F"
MOTHER DOE, Individually and on behalf of her minor daughter, JANE DOE, and on behalf of all others similarly situated, Plaintiffs, v. WILLIAM H. STEWART, M.D., individually and in his oficial capacity as Commissioner of the State of Louisiana HEALTH AND HUMAN RESOURCES ADMINISTRATION; and GARLAND L. BONIN, individually and in his official capacity as Director of FAMILY SERVICES OF THE STATE OF LOUISIANA HEALTH AND HUMAN RESOURCES ADMINISTRATION, Defendants.	Civ. No. 74-3197 Section "F"
LADY JANE, on behalf of MARY JANE, on behalf of themselves and all others similarly situated, Plaintiffs, v. HON. HARRY CONNICK, DISTRICT ATTORNEY of the Parish of Orleans; HON. WILLIAM J. GUSTE, JR., Attorney General of the State of Louisiana; WILLIAM H. STEWART, M.D., Commissioner of the LOUISIANA HEALTH AND HUMAN RESOURCES ADMINISTRATION; and LEE FRAZIER, Administrator, Charity Hospital of Louisiana, Defendants.	Civ. No. 75-474 Section "F"

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONS, STATUTES, LEGISLATIVE MATERIALS AND RULES:

OTHER AUTHORITIES:

INTEREST OF AMICI CURIAE

The National Abortion Rights Action League (NARAL) has 350,000 in thirty-seven state affiliates and the national organization. Founded in 1969, NARAL is the largest national organization dedicated solely to keeping abortion safe, legal, and accessible. NARAL recognizes that guaranteeing women the full range of reproductive choices is critical to women's autonomy and equality.

The American Association of University Women (AAUW), a network of 140,000 college-educated women, promotes equity for women and girls, education and self-development over the life span and positive social change. The AAUW supports the right of every woman and girl to safe and comprehensive reproductive health care. AAUW believes that decisions concerning reproductive health care are personal ones and that the right to make informed decisions should be available to all women.

The American Jewish Congress, an organization of American Jews founded in 1918, is dedicated to the protection of the civil liberties and civil rights of Jews and of all Americans. It believes that in the face of the great moral and religious diversity in American society concerning abortion and in the light of the Jewish tradition which in some cases command abortion, and in so many others permit it, the rules set down in Roe v. Wade should be maintained so as to permit the different traditions to advocate their respective views and the decision left to the individual woman to act in accordance with her particular religious and moral commitments.

Bossier City Medical Suite provides safe and affordable abortions for women within a 100 mile radius. If these women were forced to travel outside of Louisiana, the financial and emotional cost would be devastating.

Causeway Medical Suite (CMS) serves the women of Metarie, Louisiana by performing abortions, routine gynecological care, and pregnancy testing. CMS also provides problem pregnancy options, and birth control counseling. Our interest in the Weeks v. Connick case reflects our continuing commitment and support to the women of our community.

Delta Women's Clinic - West provides a complete range of gynecological services to women in southeast and southcentral Louisiana. Pregnancy termination is one of the services offered to women at the clinic. Should Connick be granted the dissolution of the 1976 court injunction, we would, in effect, be shut down.

The National Abortion Federation (NAF) is a professional

membership organization of abortion providers representing 300 clinics, doctor's offices and hospitals throughout the United State and Canada. NAF-member facilities perform over half of all abortions in the United States.

The National Association of Social Workers, Inc. (NASW), a non-profit professional association with 125,000 members, is the largest association of social workers in the United States. Founded in 1955, NASW has chapters in every state as well as the Virgin Islands, Puerto Rico and Europe. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession and to improving the quality of life through utilization of social work knowledge and skills. NASW is deeply committed to the principle of self-determination and to the protection in individual rights and personal privacy. The Association believes that enforcement of Louisiana's pre-Roe criminal abortion laws would violate the constitutional guarantee of due process and would also have a chilling effect on the exercise of other constitutionally protected rights.

The National Association of Social Workers, Louisiana Chapter (NASW-LA) is a professional organization representing over 1900 social workers in the State of Louisiana. The Association's interest in the Weeks v. Connick case derives from its concern that the State not override a pregnant woman's right to self-determination nor interfere in her freedom to participate or not to participate in abortion services.

The NOW Legal Defense and Education Fund (NOW LDEF) is a non-profit civil rights organization that performs a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded as an independent organization in 1971 by leaders of the National Organization for Women. NOW LDEF has participated as counsel and/or amicus curiae in numerous significant cases involving reproductive rights, including Webster v. Reproductive Health Services.

New Orleans Poor Women's Abortion Fund provides private funding of abortions for indigent women. We are quite concerned about our legal status under Louisiana's pre-Roe laws. In addition, we have become aware of the effects of the publicity caused by Mr. Connick's actions on women seeking abortions. Many women in this areas believe that abortion is now illegal in Louisiana, and we have begun to see poor women arriving at our local Charity hospital with injuries from self-induced abortions.

People for the American Way is a nonpartisan, education-oriented citizen's organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to the nation's

heritage of tolerance and pluralism, People for the American Way now has 275,000 members nationwide. The organization's primary mission is to educate the public on the vital importance of the democratic tradition and to defend it against attacks from those who would seek to limit our fundamental rights and freedoms, including the freedom of choice and due process rights at issue in this case.

Planned Parenthood Federation of America, Inc. (PPFA), a not-for-profit corporation organized in 1922, is the leading national voluntary public health organization in the field of family planning. PPFA has 174 affiliates in 47 states, including one in Louisiana. Eighty-five PPFA clinics offer abortion services as part of their program; all PPFA affiliates that do not perform abortions themselves offer counseling and referral for such services. PPFA is committed to a woman's fundamental right to obtain a medically safe, legal abortion.

Pontchartrain NOW is a New Orleans area chapter of the National Organization for Women. We are actively involved in the fight to maintain reproductive freedom in Louisiana. A large number of our members have participated in informational pickets, demonstrations and other actions to counter efforts by Mr. Connick to reinstate old Louisiana laws criminalizing abortion. We have met with Mr. Connick and Mr. Guste repeatedly on this matter.

Pro-Choice Action Network, Inc. (P-Can, Inc.) is a coalition of several pro-choice organizations in Louisiana. We have joined together to sponsor actions that will maintain reproductive freedom for the women of Louisiana. We have sponsored a number of pickets, meetings and other actions regarding the Weeks v. Connick case. We have responsibility for clinic defense against violence by anti-abortionists. This violence has increased markedly since Mr. Connick announced his intention to file the rule 60(b)5 in this case.

Voices for Reproductive Freedom believes that the right to choose when, whether, and with whom to have children is as fundamental a right as the right of freedom of speech. We are working toward establishing reproductive freedom as a human right and not a single issue to hack away at slowly. Weeks v. Connick threatens this right to the extreme.

ARGUMENT

In its order of October 6, 1989, this Court requested supplemental briefing on the following question:

> What is the conceptual and theoretical effect on a statute which has been declared unconstitutional under the U.S. Constitution by a court of last resort, if there has been a subsequent change in case law which implicates the earlier declaration of unconstitutionality? Is the affected statute revived by the subsequent favorable case law, or must another statute be enacted?

The Court need not and indeed may not address this theoretical issue. As is argued in Plaintiff's Memorandum of Law in Support of Motion to Dismiss, the motion before the Court is moot because the statutes that the Movant seeks to enforce were expressly repealed in 1978. The Court therefore does not have jurisdiction to entertain the motion.

Moreover, even if the motion presented a live controversy, the Court should not address the question it posed because it is not necessary to do so in order to resolve the pending motion. Federal Rule of Civil Procedure 60(b)(5) requires the Movant to demonstrate that "it is no longer equitable that the judgment have prospective application . . . ." For the reasons more fully set forth in Plaintiffs' briefs of August 21, 1989 and in response to the Court's October 6 order, Movant has not made the requisite showing. A Rule 60(b)(5) motion is an inappropriate vehicle with which to attack a final judgment declaring a state statute unconstitutional, and Movant has not cited a single

authority in support of his use of Rule 60(b)(5) for what amounts to an attempt to relitigate the merits of the case.

Even if this were a proper procedural posture from which to address the constitutionality of the statutes in question, Movant would need to demonstrate that the U.S. Supreme Court has so altered the protection afforded the constitutional right to choose abortion that the case would be decided differently today. Movant's suggestion that the U.S. Supreme Court's decision in Webster v. Reproductive Health Servs., 57 U.S.L.W. 5023 (U.S. July 3, 1989), effected such a change is disingenuous at best. Four of the five Justices who voted in Webster to uphold a statute that required testing for viability and prohibited the performance of abortions at public hospitals expressly stated that their decision did not overrule Roe v. Wade, 410 U.S. 113 (1973). Webster, 57 U.S.L.W. at 5025-34. In providing the fifth vote, Justice O'Connor stressed that these restrictions were already permitted under the Court's prior cases and thus Webster did not in any way change the standard of review. Id. at 5031-34.

The criminal abortion statutes in question[1] are clearly

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[1]Section 14:87 provides:

> Abortion is the performance of any of the following acts, with the intent of procuring premature delivery of the embryo or fetus:
> (1) Administration of any drug, potion, or any other substance whatsoever to a female; or
> (2) Use of any instrument or any other means whatsoever on a female.
> Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more

unconstitutional under Webster, and would not survive any standard of scrutiny the Court might apply in the future.[2] Before a state could prohibit all abortions, and allow for no exceptions, even if the women's life is threatened by the pregnancy, the Court not only would have to overrule Roe but also find that it is rational for a state to force a woman to sacrifice her life or health rather than terminate her

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than ten years.

Section 14:88 provides:

> Distribution of abortifacients is the intentional:
> (1) Distribution or advertisement for distribution of any drug, potion, instrument, or article for the purpose of procuring an abortion; or
> (2) Publication of any advertisement or account of any secret drug or nostrum purporting to be exclusively for the use of females, for preventing conception or producing an abortion or miscarriage.
> Whoever commits the crime of distribution of abortifacients shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both.

Section 14:87.4 provides:

> Abortion advertising is the placing or carrying of any advertisement of abortion services by publicizing the availability of abortion services.
> Whoever commits the crime of abortion advertising shall be imprisoned, with or without hard labor, for not more than one year or fined not more than five thousand dollars, or both.

[2]This Court is, of course, bound to follow the U.S. Supreme Court's precedent and may not base its ruling on speculations as to how the Court may rule in the future. Rodriguez de Quijas v. Shearson/Am. Express, 57 U.S.L.W. 4539, 4541 (U.S. May 15, 1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

pregnancy. No Justice has ever suggested that an absolute bar on all abortions would be rational. In fact, Chief Justice Rehnquist stated in his dissenting opinion in Roe: "[I]f the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective . . . ." Roe, 410 U.S. at 173 (Rehnquist, J., dissenting).

Finally, in order to prevail, Movant would have to show that the equities weigh in favor of reopening the case and dissolving the injunction in question. The Movant cannot meet this burden. Regardless of the current state of privacy law, the equities in this case militate strongly against granting Movant's motion. The statutes could not be revived for a number of independently dispositive reasons: (1) they have been expressly repealed, or, if not, repealed by implication; (2) their revival would create a maze of conflicting statutes in violation of the Louisiana separation of powers doctrine and the federal constitutional guarantee of due process; (3) the Louisiana separation of powers doctrine prohibits the revival without reenactment of a statute that previously has been declared unconstitutional; and (4) the statutes were enacted by a legislature that could not have fulfilled its constitutional obligation to consider the implications of its actions on constitutionally protected interests. Finally, the statute compelling all women to continue unwanted pregnancies should not be revived because it was enacted 134 years ago by a legislature

that excluded women -- against whom the laws were exclusively directed -- including from the process of selecting the legislature that enacted the statute.

Even if a legislature today could constitutionally enact a law prohibiting all abortions, bypassing the legislative process by reviving these outdated laws would be inequitable. To suddenly begin prosecuting physicians for performing abortions would unfairly disrupt the expectations of Louisiana citizens who for sixteen years justifiably relied on the Supreme Court's ruling in Roe and saw no need to work to repeal unconstitutional statutes that had been enjoined. Chief Justice Rehnquist, writing for a plurality in Webster, contemplated that the American "people," including women, would have the opportunity to work through the political process to make known their will concerning whether new restrictions on abortion should be imposed and it was on that basis that he speculated that the current legislatures could be trusted not to "enact abortion regulation reminiscent of the dark ages":

> 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 regulation 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.

Webster, 57 U.S.L.W. at 5031 (plurality) (emphasis added).

Each of these reasons independently, and certainly all of them considered together, establishes beyond question that there is no basis for the court to exercise its equitable power under

Rule 60(b)(5) to lift the injunction. Therefore, the Court should not grant the District Attorney's motion.

I. THERE IS NO BASIS IN THIS CASE FOR GRANTING MOVANT'S MOTION BECAUSE THE CRIMINAL ABORTION STATUTES THAT MOVANT SEEKS TO ENFORCE HAVE BEEN REPEALED.

Sections 14:87 and 14:88 were expressly repealed by a series of laws that were enacted subsequent to Roe v. Wade. In 1978, the Louisiana legislature enacted comprehensive legislation regulating the performance of abortions. 1978 La. Acts 435 (the "1978 Act"). The 1978 Act, though it contained a number of provisions subsequently found to be unconstitutional, was based on the Roe trimester framework and specifically permits the performance of abortions prior to viability, subject to certain regulations. It included provisions requiring, inter alia, that abortion be performed by a physician, that abortions subsequent to the first trimester be performed in a hospital, and that a second physician be in attendance at abortion after viability. The penalty for violations was set at imprisonment for up to two years.

Section 3 of the 1978 Act stated: "All laws or parts of laws in conflict herewith are hereby repealed."[3] The statutes Movant seeks to enforce contain an absolute ban on the performance of abortions and distribution of abortifacients.

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[3]Although the repeal provision at Section 3 of the Act does not appear in La. Rev. Stat. Ann., it is clearly part of the law as enacted. See Session Law, Plaintiff's Appendix to Cross-Motion to Dismiss.

Their plain language admits no exceptions.[4] This absolute prohibition on abortion cannot be reconciled with the provisions of the 1978 Act specifying when abortions may be performed, and therefore the prior acts have been expressly repealed.[5] Even if

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[4]The Louisiana Attorney General confirmed that the statute's prohibitions are absolute in his brief to the United States Supreme Court appealing the original ruling of this Court:

> As is clear from a reading of the present statute [referring to La. Rev. Stat. Ann. § 14:87] . . ., no exception [for the health of the pregnant woman] has ever existed in Louisiana. Nor have the Louisiana courts read in an exception as has been done in other states.

Memorandum in Support of Motion Under Federal Rule 60(B)(5) to Dissolve the Court's Injunction Against Enforcement of La. R.S. 14:87, :87.4 & :88, at 15-16; see also n.29 (A court that, in a related context, read in an exception for abortion to save the life of the pregnant woman "had no state authority to rely on.").

[5]Indeed, as early as 1973, the Louisiana legislature passed a law that, inter alia, provided that no person employed by the state or by an entity receiving any form of government assistance shall recommend that a woman have an abortion, except in the case of a licensed physician "acting to save or preserve the life of a pregnant woman." 1973 La. Act 72, codified at La. Rev. Stat. Ann. § 40:1299.34 (West Supp. 1976). This law expressly provided that "[a]ll laws or parts of laws in conflict herewith are hereby repealed." Id. at 3. This law, which contemplates that a licensed physician will counsel abortion in order to preserve the life of a pregnant woman, clearly conflicts with the absolute ban on performing abortions under any circumstances contained in La. Rev. Stat. Ann. § 14:87 and the absolute prohibition against the distribution of abortifacients in § 14:88, and therefore repealed those laws, even before the comprehensive provisions of the 1978 Act were enacted.

Even if the laws at issue had not been expressly repealed, under Louisiana law they would have been repealed by implication. See La. Rev. Stat. Ann. § 24:176(A)(West 1989) ("Unless specifically provided therein, all laws or parts of laws in conflict with a provision of a law subsequently enacted by the legislature are repealed by the law subsequently enacted"); Macon v. Costa, 437 So. 2d 806 (La. 1983) (if there exists an irreconcilable conflict between two acts, the latest legislative expression prevails, and the prior law yields to the extent of the conflict); In re Diane, 318 A.2d 629 (Del. Ch. 1974) (abortion law repealed by implication); cf., La. Civ. Code Ann.

the 1855 and 1920 statutes had somehow survived the 1978 enactment, the Louisiana legislature enacted abortion legislation on two subsequent occasions that would have expressly repealed the earlier laws. 1980 La. Acts 418 (the "1980 Act"); 1981 La. Act 774 (the "1981 Act"). The 1980 Act included provisions requiring, inter alia, that ultrasound tests be performed before any abortion could be performed after the seventeenth week, that a physician could not perform an abortion after viability unless the operation was necessary to preserve the health of the pregnant woman and that a physician could not perform an abortion upon a pregnant woman under the age of 18 without consent of her parent or guardian except by court order.

The Legislature again enacted abortion legislation in 1981. The 1981 legislation reenacted much of the 1980 legislation, with minor changes. Section 4 of both the 1980 Act and the 1981 Act state: "All laws or parts of laws in conflict herewith are hereby repealed." The provisions of the 1980 Act and the 1981 Act conflict irreconcilably with the absolute prohibition on abortion contained in the criminal abortion statutes and the earlier statutes have therefore been repealed.[6]

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art. 8 (West 1972) (providing that a repeal "is implied when the new law contains provisions that are contrary to or irreconcilable with those of the former law").

[6]The Legislative Digest prepared by the Legislative Council explains this provision and contrasts it to a provision of the 1978 legislation (that had been held unconstitutional) requiring all post-first trimester abortions to be performed in a hospital. The Digest states:

> The only restrictions which remain on

Under Louisiana law, a repealed statute can be revived only by subsequent legislation that specifically reenacts the repealed law by setting forth completely all of its provisions. No legislative "expression of intent" to enforce a prior policy -- such as the statement of intent in the 1981 Act[7] or the 1989 Non-

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> abortions prior to the 18th week are that the abortion must be performed by a licensed physician (R.S. 40:1299.35.2) in a facility which meets the standards imposed by laws and regulations applicable to other facilities offering medical treatment of similar complexity and risk. (R.S. 40:1299.35.16)

Legislative Digest, House Bill 1808 (emphasis added).

The Digest also illustrates the stark contrast between the provisions of the 1981 Act and the complete ban on abortions in La. Rev. Stat. Ann. § 14:87 (West 1986):

> Present law provides the following requirements based on length of pregnancy:
>
> (a) Abortions through end of 17th week -- in abortion facility which meets standards of medical facilities offering treatment of the same complexity and risk.
>
> (b) Abortion after end of the 17th week but prior to viability -- in a hospital or in an abortion facility which meets stringent standards.
>
> (c) Abortion after viability - in a hospital
>
> Proposed law provides the following requirements based on length of pregnancy:
>
> (a) first trimester - none
>
> (b) second and third trimester - in a hospital.

Legislative Digest, Senate Bill 1090.

[7]La. Rev. Stat. Ann. § 40:1299.35.0 (West Supp. 1989) states in relevant part: "[T]he Legislature finds and declares that the longstanding policy of this State is to protect the right of the unborn child from conception by prohibiting abortion impermissible only because of the decisions of the United States

binding Resolution[8] -- can take the place of the enactment of substantive law. The requirement of specific re-legislation is so fundamental to Louisiana's jurisprudence that it has been expressly included in the Louisiana Constitution since 1845:

> A bill enacting, amending, or reviving a law shall set forth completely the provisions of the law enacted, amended or revived. No system or code of laws shall be adopted by general reference to it.

La. Const. art. 3 § 15(B) (emphasis added); see also La. Rev. Stat. Ann. § 1:15 (West 1987) ("The repeal of a repealing law shall not revive the first law.").[9]

Supreme Court and that, therefore, if those decisions . . . are ever reversed or modified . . . to allow protection of the unborn then the former policy of this State to prohibit abortions shall be enforced."

This statement of intent cannot revive previously repealed Louisiana laws because it does not refer, even by title, to abortion prohibitions in the criminal code of 1855 or any other previous law. Moreover, the statement lacks the specific operative provisions that would be necessary for enforcing any policy prohibiting abortions.

[8]In 1989, the Louisiana legislature passed a resolution calling upon district attorneys to "enforce state criminal laws which prohibit abortion to the fullest extent permitted under the U.S. Constitution" La. House Con. Res. 10, 2d Extraordinary Sess. (July 7, 1989). The resolution is non-binding because it was passed during a special six-day session called to balance the budget. See La. Const. art. 3 § 2(B) ("The power to legislate shall be limited, under penalty of nullity, to the objects specifically enumerated in the petition [stating the objective of the special session]."). A legislative resolution adopted at a special session cannot have effect unless the object of the resolution is germane to the governor's call for the extraordinary session. Op. Atty. Gen. at 373 (1946-48).

[9]Although the constitutional provision requiring an act to set out its provisions at length and prohibiting the adoption of systems and codes by general reference has gone through some stylistic changes, the meaning has remained the same. All Louisiana constitutions since 1845 have contained provisions similar to those included in La. Const. art. 3 § 15(B). See La. Const. of 1852, arts. 116 & 117; La. Const. of 1864, arts. 119 &

Thus, in 1978, 1980 and 1981, the Louisiana legislature enacted comprehensive legislation regulating the lawful performance of abortions. By expressly repealing prior conflicting laws, the legislature was wisely attempting to protect the citizens of Louisiana from having to face a panoply of irreconcilable penal laws. Once repealed, the criminal abortion statutes cannot be revived except by substantive reenactment of the complete law by the legislature. No such reenactment has occurred.

120; La. Const. of 1868, arts. 115 & 116; La. Const. of 1879, arts. 30 & 31; La. Const. of 1898, arts. 32 & 33; La. Const. of 1913, arts. 31-33; La. Const. of 1921, art. 3 § 18; La. Const. of 1945, arts. 119 & 120; see also Davenport v. Hardy, 349 So. 2d 858 (La. 1977).

In interpreting the provision of the 1852 Constitution prohibiting revival by general reference, the Louisiana Supreme Court stated:

> This was intended to prevent the . . . revival of laws merely by a reference to their titles. It was intended that . . . each revival should speak for itself; should stand independent and apart from the Act revived . . . . It was therefore provided that "in such cases," if the object was to revive an act, it should be "reenacted" throughout.

Arnoult v. City of New Orleans, 11 La. Ann. 54, 57 (1856). Courts have consistently struck down as unconstitutional legislative attempts to revive repealed laws by reference. See, e.g., Tolar v. State, 315 So. 2d 22, 25 (La. 1975) ("The ordinances that were invalid prior to the legislation cannot constitutionally be rendered valid until they have been completely reenacted under the procedure provided . . . ."); State v. Tugwell, 199 La. 18, 5 So. 2d 370, 372 (1941) (quoting Arnoult, 11 La. Ann. 54 (1856)); Airey v. Tugwell, 197 La. 982, 3 So. 2d 99, 103 (1941) (quoting the trial court, the Supreme Court of Louisiana stated, "'There can be no doubt that under our Constitution no law can be re-enacted merely by reference and that the re-enactment of a repealed law by reference is prohibited.'").

II. EVEN IF THE CRIMINAL ABORTION STATUTES AT ISSUE HAD NOT BEEN EXPRESSLY REPEALED, THEY COULD NOT BE REVIVED WITHOUT NEW LEGISLATION.

A. If the Statutes Were Revived, Without Reenactment, They Would Create an Unconstitutional Statutory Labyrinth of Conflicting Provisions Concerning Abortion.

Should this Court determine that the abortion statutes previously held unconstitutional were not repealed by the legislature's enactment in 1978 (or in 1980 or 1981), Louisiana's citizens would be faced with a maze of conflicting penal statutes relating to abortion. Today there are twenty-two statutory sections dealing directly with abortion printed in the Louisiana Revised Statutes Annotated.[10] Many of these sections are hopelessly in conflict and many have been declared unconstitutional. See Margaret S. v. Treen, 597 F. Supp. 636 (E.D. La. 1984), aff'd, 794 F.2d 994 (5th Cir. 1986); Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La. 1980), aff'd, 794 F.2d 994 (5th Cir. 1986). Revival of the old laws without reenactment would allow prosecutors and judges to pick and choose which among the conflicting statutes to enforce, thereby creating a situation in which the dictates of the criminal abortion law of Louisiana would be chaotic, arbitrary and indecipherable to ordinary citizens.

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[10]They are codified at La. Rev. Stat. Ann. §§ 14:87 & 14:88 (West 1986) and §§ 40:1299.35.0-35.18 (West Supp. 1989); see also La. Rev. Stat. Ann. § 37:1285 (West 1988).

1. Reviving the statutes without reenactment would violate the separation of powers provision of the Louisiana Constitution.

Louisiana maintains a separation of powers doctrine that the Louisiana Supreme Court has recognized as being stronger than the federal separation of powers doctrine. See La. Const. art. 2 § 2 ("Except as otherwise provided by this constitution, no one of these [executive, legislative and judicial] branches, nor any person holding office in one of them, shall exercise power belonging to either of the others."). Unlike the federal Constitution, the "constitutions of Louisiana, from 1812 to the present, specifically confine the powers of each of the three departments of government." State v. Broom, 439 So. 2d 357, 366-67 (La. 1983) (on rehearing) (emphasis added) (footnote omitted).

Were this Court to agree to revive Louisiana's old abortion laws, it would permit the executive and the judiciary to pick and choose which of many conflicting statutes to enforce. Prosecutors and judges -- and not the legislature -- would be in effect deciding what behavior constitutes criminal conduct. This is precisely what the Louisiana Supreme Court has repeatedly found is prohibited by its strong separation of powers doctrine in the Louisiana Constitution. In Broom, that court stated unambiguously:

> [T]he legislature must define felonies. Louisiana courts have consistently followed their constitutional mandate, holding that only the legislature can perform the legislative function of defining serious criminal offenses.

> State v. Truby, 29 So. 2d 758 (La. 1947); State v. Williams, 173 La. 1, 136 So. 68 (1931); State v. Smith, 195 So. 523 (La. 1940); State v. Whitlock, 193 La. 1044 (La. 1939); State v. Maitrejean, 192 So. 361 (La. 1939); State v. Billot, 97 So. 589 (La. 1923). Williams, supra, stated: "in Louisiana, all crimes are statutory, and the determination of what acts constitute crimes are purely legislative functions which cannot be delegated . . . ."

Id. at 367 (footnote omitted).

Permitting the enforcement of §§ 14:87 and :88 would put prosecutors in a position of choosing between one law that affirmatively permits certain behavior, and another law that specifically criminalizes that same behavior. The executive would have the power to look at conflicting statutes and actually decide what behavior will be considered criminal for the people of Louisiana. For example, if the prosecutor chooses to enforce the 1981 law, then abortion prior to the 18th week will be legal as long as it is performed by a licensed physician in a proper facility. If, on the other hand, the prosecutor decides to prosecute under §§ 14:87 and :88, then that very same conduct would be illegal.[11]

Thus, the decision whether certain conduct is criminal would rest not with legislative action, but with the discretion of the executive. The citizens of Louisiana could not know whether certain conduct is legal or illegal by looking at the statutes;

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[11]This is fundamentally different, of course, from the run-of-the-mill case in which a prosecutor chooses among various statutes that outlaw some portion of a criminal activity, but are silent on other behavior. In that case, the prosecutor chooses among statutes of varying breadth but not what conduct will be criminalized.

rather, they would need to predict future decisions left to the total discretion of prosecutors and judges. If the separation of powers doctrine means anything, it must mean that this state of affairs is constitutionally unacceptable.

That some of the conflicting provisions might clearly define criminal conduct when viewed in isolation from the other statutes does not overcome such constitutional infirmities. Courts have, in fact, found that even where illegal conduct is clearly defined, if the statute's penalty provision is so unclear that it leaves to the prosecutor or the judiciary the choice of applying one of a few conflicting penalties, each clear in and of itself, the law cannot be upheld. In United States v. Evans, 333 U.S. 483 (1948), a unanimous Supreme Court reasoned that where the judiciary is put in the position of having to choose between conflicting provisions, "[i]t is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision." Id. at 495.[12] For the Court to seek to sort

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[12]Other courts have followed Evans where the statute essentially leaves the executive and the judiciary the choice of applying different penalty provisions. AWA v. Guam Memorial Hosp. Auth., 726 F.2d 594, 598 (9th Cir. 1984) ("resolution of these conflicting statutes is 'essentially the sort of judgment legislatures rather than courts should make.'"); Commonwealth v. Gagnon, 387 Mass. 567, 441 N.E.2d 753, 757 (Mass. 1982), cert. denied, 464 U.S. 815 (1983) (inconsistent penalty schemes amounts to "statutory maze [which] provides no notice."). Even where a court has cured a conflict in a statutory scheme that was clearly an inadvertent drafting error, it has been recognized that "two penalty schemes that are directly contradictory" do not "afford[] fair notice to individuals." United States v. Colon-Ortiz, 866 F.2d 6, 9 (1st Cir.), cert. denied, 109 S.Ct. 1966 (1989).

out such a law "would be to proceed in an essentially legislative manner for the definition and specification of the criminal acts." Id. at 490-91.

The case at hand provides an even more compelling case for not allowing such a law to be revived by a branch other than the legislative branch. In Evans, the proscribed conduct was clear -- only the penalty provision allowed for conflicting choices. See id. at 484-85. If the abortion laws are revived, the executive and the judiciary would have complete discretion over not only what penalties are applicable, but over whether certain conduct itself is illegal.

2. Reviving the statutes without reenactment would violate the Due Process Clause of the U.S. Constitution.

Creating a situation in which prosecutors can choose among conflicting statutes to determine what is criminal would also violate the Due Process Clause of the United States Constitution. Average citizens would have little way of understanding the legal consequences of their actions. As Justice Black has written, conflicting statutes are "contrary to the very idea of government by law. It would create doubt, ambiguity, and uncertainty, making it impossible for citizens to know which one of the . . . conflicting laws to follow, and would thus violate one of the first principles of due process." North

Carolina v. Pearce, 395 U.S. 711, 738-39 (1969).[13]

Where laws give "conflicting commands," there "is not fair warning." United States v. Cardiff, 344 U.S. 174, 176 (1952). Where criminal laws -- separately or together -- provide vague messages to citizens, their "vice . . . is the treachery they conceal either in determining what persons are included or what acts are prohibited." Id. Even when some portion of a statutory or regulatory scheme is clear and unambiguous, it does not save that scheme from being unconstitutional if the overall effect is to mislead or confuse citizens as to which behavior is legal and which is not. See United States v. Pennsylvania Indus. Chem. Corp., 411 U.S. 655, 674 (1973) (when statute is clear, but where executive agency misleads citizens as to what is legal, "there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution."). Revival of the abortion laws would have precisely that effect.

The existence of such conflicting statutes moreover, would also violate the requirement that there exist "minimal guidelines to govern law enforcement." Kolender v. Lawson, 461 U.S. 352, 358 (1983) (citing Smith v. Goguen, 415 U.S. 566, 574 (1974)). As Justice O'Connor stated in her majority opinion in Kolender,

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[13]"If the language is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, then the statute violates due process." State v. Baker, 359 So. 2d 110, 113 (La. 1978); see also Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.").

"Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" Id. at 358 (citing Smith, 415 U.S. at 574). See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) ("[V]ague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with attendant dangers of arbitrary and discriminatory application").[14]

Due process of law requires the lawfulness of particular conduct to be defined by clear and consistent statutory enactments. Where a scheme of conflicting statutes on the same conduct exists, "[a] statute may not be so vague and indefinite as to be impossible of reasonable, fair, and uniform operation." State v. Baker, 359 So. 2d 110, 113 (La. 1978) (citations omitted).[15] Again, the fact that some portions of a law -- or that some or each of conflicting laws -- might be clearly defined

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[14]See also Papachristou v. City of Jacksonville, 405 U.S. 156 (1972); Thornhill v. Alabama, 310 U.S. 88 (1940); Herndon v. Lowry, 301 U.S. 242 (1937); see also People v. ACME Markets, Inc., 37 N.Y.2d 326, 372 N.Y.S.2d 590, 334 N.E.2d 555 (1975) (where statute had not been enforced, sudden enforcement at behest of special interest group violated the equal protection clause.

[15]"[A] broadly worded statute necessarily delegates the power of ad hoc decision to officials. And so the officials' action cannot be said to derive from a prior legislative decision; it does not represent the will of the state expressed through the political process. When the Court declares the statute void for vagueness, it withholds adjudication of the substantive issue in order to set in motion the process of legislative decision." A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 152 (1962).

cannot cure the consitutional defect. Laws that are clear but incapable of uniform enforcement create a structure whereby prosecutors and police officers have unfettered discretion in enforcing the laws. See Houston v. Hill, 107 S.Ct. 2502, 2511-12 (1987).[16]

3. Section 14:87 or § 14:88, even standing alone, would violate the Due Process Clause.

This court also should not revive sections 14:87 or :88 because even standing alone, each is unconstitutionally vague. The broad sweep of its language makes a uniform and fair application a virtual impossibility, leaving to the ad hoc decisions of the prosecutors a determination of which people and which behavior would fall within the law's scope. Such a law would permit an impermissible degree of discretion in enforcement officers in violation of the Due Process Clause. See Board of Airport Comm'rs v. Jews for Jesus, 107 S.Ct. 2568, 2573 (1987); Houston v. Hill, 107 S.Ct. 2502, 2511-12 (1987).

The 1855 law specifically dropped the language "lose her child" from the 1805 Louisiana abortion law and spoke only to taking drugs for the purpose of "procuring abortion, or a premature delivery." The 1870 amendment was the first time that abortions by methods other than drugs are mentioned. The law

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[16]Even if it is unclear whether the criminal abortion statutes were sufficiently in conflict with the more recent enactments to cause the repeal of the older laws, this enforcement.

forbids the use of any instrument or "of any drug, potion, or any substance to a female" to procure the "premature delivery of an embryo or fetus." The plain language in this "drug, potion or any substance" clause would cover the use of certain contraceptives that act as abortifacients such as the IUD and some forms of oral contraceptives. The plain meaning of "premature delivery" would cover cesarean sections at an earlier stage of pregnancy for health reasons. It would also cover situations where drugs or pain killers were used to induce childbirth at any time that could be interpreted by a prosecutor as early or premature. Although movant might state that he does not intend to enforce § 14:87 (which has no exceptions) where the pregnant woman's life is at stake, such assurances must flow from a statute itself and not the promises of a single district attorney to satisfy due process.

Moreover, the plain language of § 14:88(1) outlaws the distribution of any substance that could be deemed an abortifacient and § 14:88(2) bans the "[p]ublication of any advertisement or account of any secret drug or nostrum . . . for preventing conception (emphasis added). This law is not limited to transactions of a commercial nature. Besides its potential chilling effect on acceptable behavior, the breadth of this law would leave every hospital, health clinic, drug store, pharmaceutical company, distributor and newspaper who ever advertises or distributes any contraceptive at the mercy of the unrestrained discretion of prosecutors.

These substantial vagueness problems could leave the citizens of Louisiana uncertain about the legality of such personal and health-related behavior as using contraception and seeking a cesarean section. The breadth of the statute would violate due process by defining criminal conduct in terms so broad that it would cover large numbers of women whom the executive would never have any intention of prosecuting. Due process does not permit a statute to "set a net large enough to catch all offenders, and leave it to courts to step inside and say who could be rightfully detained and who could be set at large." United States v. Reese, 92 U.S.(2 Otto) 214, 221 (1876), quoted in Houston v. Hill, 107 S.Ct. at 2511-12.

B. Under Louisiana Law, a Statute That Has Been Declared Unconstitutional Cannot Be Revived Without New Legislation.

Under Louisiana law, even if the statutes at issue had not been expressly repealed, they could not be revived without reenactment by the legislature. The Louisiana Supreme Court has clearly stated that:

> When a law is stricken as void, it no longer has existence as law; the laws cannot be resurrected thereafter by a judicial decree changing the final judgment of constitutionality as this would constitute a reenactment of the law by the Court -- an assumption of legislative power not delegated to it by the Constitution.

Jefferson v. Jefferson, 224 La. 493, 153 So. 2d 368, 370

(1963).[17] This ruling was clearly based on Louisiana's strong separation of powers doctrine which requires that only the state legislature "define [ ] serious criminal offenses." State v. Broom, 439 So. 2d 357, 366-67 (La. 1983). This court is bound to follow the Louisiana rule against revival, which must control the fate of the statutes at issue here.

The Movant claims that the holding in Jefferson has been called into question by State v. Douglas, 278 So. 2d 485 (La. 1973). See Defendant's Response Memorandum on Motion at 48 n.40. The court in Douglas addressed a question about whether its prior decision in State v. Hudson, 253 La. 922, 221 So. 2d 484 (1969), had the effect of invalidating an evidentiary statute as unconstitutional. After discussing the question at some length, the court concluded that it had not previously held the law to be unconstitutional and reaffirmed its validity. 278 So. 2d at 190. As an aside, the court suggested in a footnote that even if it had been required to overturn a prior decision holding the law unconstitutional, the court would have entertained the idea of reviving that particular statute in that particular context. This brief reference in a footnote in Douglas was mere dictum and it did not even cite, let alone call into question the broader holding of Jefferson.

Moreover, the case at hand is far different from Douglas.

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[17]The Louisiana Supreme Court's adoption of this rule is consistent with its strong policy against revival of repealed statutes. See Louisiana Const. Art. 3 § 15(B); La. Rev. Stat. Ann. § 24:176(A) (West 1989).

Douglas involved a suspected but unclear holding of constitutionality that was called into question only a short time after it was decided. By contrast, the statutes at issue here have been recognized as unconstitutional for sixteen years, during which time the citizens of Louisiana have relied on the statutes' unenforceability and developed a strong interest in their continuing to be enjoined.[18]

Citizens as well as legislators on both sides of the abortion issue have relied on the pre-Roe laws being null and void for 16 years and have adjusted their behavior accordingly. Even the Solicitor General noted in the brief of the United

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[18]Reliance interests have traditionally played an important role in cases where the status of previously overturned statutes have been called into question. In Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940), the Supreme Court acted to protect those who relied on a final debt readjustment proceeding, even though the proceeding was unconstitutional:

> The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of a subsequent ruling as to invalidity may have to be considered in various aspects -- with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination.

Id. at 374; see also Warring v. Colpoys, 122 F.2d 692, 645, 646 (D.C. Cir. 1941) (stating that "[w]hen a case is decided it is expected that people will make their behavior conform to the rule it lays down . . . and observing that "law loses its vital meaning if not correlated to the organic society in which it lives" (emphasis added)).

States in Webster that this has had a distortive effect on the political actions and energies of those who oppose the right to choose abortion:

> The Court's continuing effort to oversee virtually all elements of the abortion controversy has seriously distorted the nature of abortion legislation. . . . And because legislators know that whatever they enact in this area will be subject to do novo review by the courts, they have little incentive to try to moderate their positions. The result, all too often, has been statutes that are significant primarily because of their highly "inflammatory" symbolic content. . . . This process has undermined the accountability of legislative bodies, and has disserved the courts and the Constitution.

Webster, Brief of the United States as Amicus Curiae at 21 n.15 (emphasis added).

Citizens of Louisiana who support the right to choose have justifiably relied on the fact that criminal abortion laws were void, and adjusted their behavior in the political process accordingly.[19] In reliance on an unambiguous decision of the highest court in the land protecting a fundamental right, they did not expend time and effort to repeal outmoded and unenforced state laws, and also to work in opposition to proposed laws that

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[19]Justice Blackmun, in his dissent in Webster, eloquently observed that "millions of women, and their families, have ordered their lives around the right to reproductive choice" and that the existence of Roe v. Wade shaped the "aspirations and settled understandings" of citizens. Webster, 57 U.S.L.W. at 5041. The effect of an automatic revival of the antiquated Louisiana laws in question must be considered with respect to "particular relations, individual and corporate, and particular conduct, private and official" that would be adversely affected if the antiquated criminal laws were to be enforced. See Chicot, 308 U.S. at 374. Louisiana's women have for more than fifteen years relied on the right to choose abortion and Louisiana's doctors have relied on the right to recommend and perform them as part of confidential relationships with their patients.

were clearly unconstitutional under Supreme Court precedent. Were this Court completely to disregard this reliance interest and lift the injunction, every abortion clinic and abortion service in the state would be immediately shut down before any meaningful political participation and debate could take place. Particularly in light of the considerations of equity that Rule 60(b)(5) requires, this Court should not permit the enforcement of a law that would eviscerate a fundamental right before the citizens of Louisiana have been provided the opportunity to participate in the political process at a time when the stakes for all sides are clearly known.

C. The Criminal Abortion Statutes At Issue Cannot Be Revived Without Reenactment Because the Legislature Could Not Have Considered Their Impact On Women's Important Constitutional Interests.

Reviving the criminal abortion statutes would lead to the wholesale denial of important constitutional liberty interests that the enacting legislature never even considered. In a myriad of contexts in which legislative action has tread close upon constitutional interests, the Supreme Court has required a clear indication that the accountable legislative body gave "careful and purposeful consideration" to "decisions of great constitutional import and effect." Greene v. McElroy, 360 U.S. 474, 507 (1959).[20] The Louisiana law prohibiting all abortions

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[20]This constitutional requirement is not predicated on the existence of a fundamental right; it requires only that an important constitutional interest be implicated. Even the Supreme Court Justices who have indicated a willingness to

was enacted over a century before the constitutional implications of restrictions on abortion had been recognized.[21] The state legislature, therefore, lacked the necessary information to have adequately deliberated the profound modern day constitutional implications of this legislation. As a result, these statutes cannot be revived without legislative reenactment.

In a case factually similar to the present one, Abele v. Markle, 342 F. Supp. 800 (D. Conn. 1972), Judge Newman in a concurrence recognized prior to Roe v. Wade that the "right to privacy" extends to protect a woman's choice of abortion and held unconstitutional a Connecticut prohibition against abortion which was enacted in 1860. In analyzing the legislation, Judge Newman described why in such important liberty cases, courts should require that the legislature have considered how its purpose for enacting a law weighed against the individual liberty interests upon which it encroached. Newman stated that where such "legislative determination has not been shown to be

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consider overturning Roe at some future date have acknowledged that women have a constitutionally protected "liberty interest" in being able to choose abortion. See Webster v. Reproductive Health Servs., 57 U.S.L.W. 5023, 5031 (U.S. July 3, 1989) (plurality). Indeed, Justice O'Connor, reinterpreting the Court's fundamental rights jurisprudence, would apply heightened scrutiny to any restriction that imposes an "undue burden" on the abortion decision. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 828-29 (O'Connor, J., dissenting).

[21]Roe v. Wade, of course, had not yet been decided in 1855, the year that Louisiana's absolute ban on all abortions was first enacted; in 1888, the last time it received full legislative consideration; or in 1920, the year the prohibition on the distribution of abortifacients and on advertising of contraceptives for use by women was passed.

made . . . it is inappropriate to decide the constitutional issue that would be posed if such legislative justification was before us." 342 F. Supp. at 810. Newman's opinion stressed:

> Once a statute is shown to impair a constitutionally protected freedom, there is no reason to presume that the legislature would want that freedom impaired because a rational purpose can later be postulated . . . . [T]he legislature should have the opportunity of deciding whether it chooses to advance such an interest. Its affirmative decision might still be unconstitutional, but a reviewing court will then have before it a full development of the competing interests.

Id. at 811 n.8.

In both Greene v. McElroy, 360 U.S. 474, and Kent v. Dulles, 357 U.S. 116 (1958), the Supreme Court was unwilling to reach the constitutionality of the particular executive action at issue because it did not believe that Congress had ever made a considered judgment concerning whether constitutionally suspect procedures or standards should be used to deprive individuals of significant liberty and property interests. In Greene, the Court refused to reach the question whether the petitioner had been denied due process of law in being deprived of his employment without the right to cross-examination because the Court found that it was unclear that Congress had ever intended to authorize the possible constitutional infringements at issue. 360 U.S. at 508. "[E]xplicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws." Id. at 507. In Kent v. Dulles, the Court similarly declined to reach the question of the constitutionality of the implementation

of a program to withhold passports to citizens based on their beliefs or associations because it found no explicit congressional authorization for such encroachments of the right to travel. 357 U.S. at 129-30. The Court stressed that "if . . . `liberty' is to be regulated, it must be pursuant to the lawmaking functions of the Congress."[22] Id. at 129.

In other "traditionally sensitive areas"[23] of constitutional law -- including cases implicating federalism concerns,[24] the

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[22]By avoiding the substantive constitutional issue, "[the Court in Kent v. Dulles] was remanding to Congress for a second look -- not for the necessary initial decision, but for orderly, deliberate, explicit, and formal reconsideration of a decision previously made, but made back-handedly, off-handedly, less explicitly than is desirable with respect to an issue of such grave importance." A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 165-66 (1962).

[23]United States v. Bass, 404 U.S. 336, 349 (1971).

[24]In the sensitive area of federal/state relations, for instance, the Court has required that Congress make "its intention unmistakably clear in the language of the statute" when Congress intends to exercise its prerogative to abrogate the Eleventh Amendment immunity of the states through legislation enforcing the Fourteenth Amendment. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985); see also Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 99 (1984); Quern v. Jordan, 440 U.S. 332, 343 (1979) (Rehnquist, J., majority) (requiring a "clearer showing of congressional purpose to abrogate Eleventh Amendment immunity"). Cf., Employees v. Department of Public Health & Welfare, 411 U.S. 279, 286-87 (1973) (declining to authorize suit against state under Fair Labor Standards Act "where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the States and putting the States on the same footing as other employers is not clear"). The Court has applied a similar requirement in reviewing claims that Congress has preempted state legislation. In New York State Dep't of Social Servs. v. Dublino, 413 U.S. 405, 417 (1973), for example, the Court noted that "[f]ar more would be required to show the 'clear manifestation of [congressional] intention' which must exist before a federal statute is held 'to supersede the exercise' of state action." (citations omitted).

prohibition against cruel and unusual punishment,[25] free expression[26] and religious liberty[27] -- the Supreme Court has

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[25]See, e.g., Thompson v. Oklahoma, 108 S.Ct. 2687, 2711 (1988) (O'Connor, J., concurring).

[26]In a case whose "radiations touch[ed], on the one hand, the very basis of a free society, that of the right of expression beyond the conventions of the day, and, on the other hand, the freedom of society from constitutional compulsion to subsidize enterprise," Hannegan v. Esquire, Inc., 327 U.S. 146, 160 (1946) (Frankfurter, J., concurring), the Court refused to find statutory authorization for the Postmaster General to deny second class mailing rates to periodicals he found did not sever the "public good." The Court insisted that Congress had to express clearly its desire to strike the balance of constitutional considerations to authorize that assertion of power by the Postmaster:

> [G]rave constitutional questions are immediately raised once it is said that the use of the mail is a privilege which may be extended or withheld on any grounds whatsoever. . . . The provisions of the [statute] would have to be far more explicit for us to assume that Congress made such a radical departure form our traditions and undertook to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.

Id. at 156 (majority opinion).

In United States v. Rumley, 345 U.S. 41 (1953), a case in which First Amendment freedoms were at stake, the Court struck down a contempt of Congress conviction because of insufficiently explicit statutory authorization for the House Select Committee on Lobbying Activities to pursue the line of the inquiry at issue. The Court stated that "[w]henever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits." Id. at 46.

[27]In National Labor Relations Board v. Catholic Bishop, 440 U.S. 490, 507 (1979), the Court held that "in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of" the National Labor Relations Board, it would not "construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First

sought a clear indication that "the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." United States v. Bass, 404 U.S. 336, 349 (1971). In Thompson v. Oklahoma, 108 S.Ct. 2687 (1988), for example, where a state sought to execute a juvenile, Justice O'Connor refused to reach the question whether a legislature is constitutionally barred from deliberately authorizing capital punishment for 15-year-olds, because she found that there was "no indication that any legislative body in the country has rendered a considered judgment approving the imposition of capital punishment on juveniles who were below the age of 16." Id. at 2708 (emphasis added). She observed that:

> [T]here is a considerable risk that the Oklahoma legislature either did not realize that its actions would have the effect of rendering 15-year-old defendants death-eligible or did not give the question the serious consideration that would have been reflected in the explicit choice of some minimum age for death-eligibility. . . . [T]he Oklahoma [death penalty] statutes have presented this Court with a result that is of very dubious constitutionality, and they have done so without the earmarks of careful consideration that we have required for other kinds of decisions leading to the death penalty. . . . [Remanding the statute to the legislature] allows the ultimate moral issue at stake in the constitutional

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Amendment Religion Clauses." When "religious liberty" is threatened, the Court has stated "[c]ogent evidence would be necessary to convince [the Court] that Congress" intended to reverse the traditional policy "to accommodate the military requirements to the religious scruples of the individual" by insisting that aliens agree to bear arms to gain citizenship. Girouard v. United States, 328 U.S. 61, 69 (1946).

> question to be addressed in the first instance by those best suited to do so, the people's elected representatives.

Id. at 2711 (emphasis added).[28]

It is difficult to imagine an instance in which there could have been less consideration of a more serious encroachment on a constitutional liberty than the enactment of the 1855 Louisiana

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[28]Justice Stevens has also expressed his concern with the quality of legislative deliberation when constitutional liberties are at stake. See Fullilove v. Klutznick, 448 U.S. 448 (1980) (Stevens, J., dissenting) (noting that "due process requires that the 'most searching examination' be conducted by Congress rather than by a federal court"); Califano v. Goldfarb, 430 U.S. 119, 223 (1977) (Stevens, J., concurring in judgment) ("Perhaps an actual, considered legislative choice would be sufficient to allow this statute to be upheld, but that is a question I would reserve until such a choice has been made."); Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977) (Stevens, J., dissenting) ("[T]here is no reason to believe that the discrimination is a product of an actual legislative choice (footnote omitted"); see also Hampton v. Mow Sun Wong, 96 S.Ct. 1895 (1976) (Stevens, J., writing for the majority); cf., Sager, Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc., 91 Harv. L. Rev. 1373, 1414 (1978) ("Mow Sun Wong posits a right to procedural due process which requires that some legislative actions be undertaken only by a governmental entity which is so structured and so charged as to make possible a reflective determination that the action contemplated is fair, reasonable, and not at odds with specific prohibitions in the Constitution.").

Several respected commentators have argued that courts should -- and often do -- stringently examine the consideration given to legislation and procedure followed by the legislature when important constitutional liberties are threatened. See L. Tribe, American Constitutional Law (1988); Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269 (1975); G. Calabresi, A Common Law for the Age of Statutes (1982); Linde, The Due Process of Lawmaking, 55 Nebr. L. Rev. 197 (1976). Other commentators have urged that courts should more often perform a "remand" to the legislature, rather than manipulating constitutional doctrine to reach the goal of encouraging proper legislative consideration. See A. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (1962); Bickel & Wellington, Legislative Purpose and the Judicial Process: The Lincoln Mills Case, 71 Harv. L. Rev 1 (1957).

abortion statute. Revival of the 1855 statue would result in a complete denial for the women in Louisiana of their privacy interests in choosing abortion, even though the legislature that enacted the statute could not possibly have considered its serious impact on women's constitutional liberty interests. This statute was enacted not only before legislatures had to consider the privacy interests in making personal decisions concerning abortion, see Roe v. Wade, 410 U.S. 113 (1973), contraception, see Griswold v. Connecticut, 381 U.S. 479 (1965), bodily integrity, see Winston v. Lee, 470 U.S. 753 (1985), and reproduction, see Skinner v. Oklahoma, 316 U.S. 535 (1942), but before state legislatures even had to consider federal individual rights or the notion that women must be considered as equal citizens in our society, see U.S. Const. amend. XIV.

The legislative consideration of individual constitutional liberties, wholly absent in this case, is even more critical where, as here, a fundamental right is at stake. Even if Movant's prediction is correct and the Supreme Court at some future date holds that a state may assert a compelling interest in the fetus to justify abortion restrictions, all such restrictions would be required to be narrowly tailored to further the state's interest and not trample unnecessarily on the fundamental right. See, e.g., Shelton v. Tucker, 364 U.S. 479, 488 (1960).[29] This requirement presupposes that a legislature

[29]As the Supreme Court itself has observed, this test has been applied "[i]n a variety of contexts." Police Dep't v. Mosley, 408 U.S. 92, 101 n.8 (1972).

This requirement of extra care in crafting laws that infringe on fundamental rights was also recently emphasized in Sable Communications v. FCC, 57 U.S.L.W. 4920 (U.S. June 23, 1989), in which the Court struck down a federal law prohibiting all indecent interstate commercial telephone communications as violative of the First Amendment. Although the government argued that in enacting the law Congress had determined that there existed no sufficiently effective way to protect minors short of the total ban, the Court declared: "[T]he congressional record contains no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means . . . to achieve the Government's interest in protecting minors." Id. at 4923. Thus, the Court expressed its concern that when a legislature contemplates an action that might implicate fundamental rights, the state actor must consider at the time of enactment the importance of the interests involved and the severity of the intrusion proposed by its laws.[30]

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[30]Similarly, the Court in United States v. Robel, 389 U.S. 258 (1987), held that a law prohibiting members of a communist action organization from working in a defense facility was an unconstitutional violation of the First Amendment. The Court noted that the "task of writing legislation which will stay within those [constitutional] bounds has been committed to Congress. Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms (citations omitted)." Id. at 268. The Court's acknowledgement of Congress's duty to legislate within constitutional "bounds" assumes that Congress will at a minimum know what these "bounds" might be.

In Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980), the Court held

Moreover, the Court has consistently required governmental bodies enacting affirmative action plans to consider carefully the degree to which the plan burdens the individual constitutional rights of third parties. City of Richmond v. J.A. Croson Co., 57 U.S.L.W. 4132 (U.S. Jan. 23 1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 265 (1986).[31]

In Rostker v. Goldberg, 453 U.S. 57 (1981), in upholding a law requiring only men to register for the draft, Justice Rehnquist, writing for the majority, attached great significance to the fact that Congress and its committees not only "carefully considered and debated the idea of requiring registration for both sexes" but that when engaging in such consideration, "Congress was fully aware not merely of the many facts and figures presented to it . . . but of the current thinking as to the place of women in the armed forces." (emphasis added). Here, in contrast, this Court is being asked to revive a criminal

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unconstitutional a village ordinance prohibiting door to door solicitation of contributions by charitable organizations not using at least 75% of their receipts for "charitable purposes". The Court said that the substantial governmental interests asserted "could be sufficiently served by measures less destructive of First Amendment interests" and "less intrusive than a direct prohibition." Id. at 636-37. The Court's opinion illustrates that a governmental entity has to consider the constitutional import of its actions in order to avoid constitutional infringement. Cf., Hynes v. Mayor of Oradell, 425 U.S. 610, 616 (1976); Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978); Butler v. Michigan, 352 U.S. 380, 383-384 (1957).

[31]See also United States v. Salerno, 481 U.S. 739, 750-51 (1987) ("[I]n circumstances where the government interest is sufficiently weighty [important liberty interests may] be subordinated to the greater needs of society. We think that Congress' careful delineation of the circumstances under which detention will be permitted satisfies this standard.").

law, that would lead to the wholesale denial of Louisiana women's procreative liberty interest, that was considered, debated and voted on when the "current thinking as to the role of women" was still 28 years behind the time when a United States Supreme Court Justice would write that "the paramount destiny and mission of the role of women are to fulfill the noble and benign offices of wife and mother." Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring).

III. THIS COURT SHOULD NOT REVIVE THE 1855 LOUISIANA ABORTION STATUTE BECAUSE OF THE STRONG LIKELIHOOD THAT IT VIOLATES THE EQUAL PROTECTION CLAUSE'S PROHIBITION AGAINST SEX DISCRIMINATION.

Movant asserts that the 1855 statute prohibiting all abortions was based solely on concern for the fetus. Implicit in this contention is the suggestion that these laws were not in any substantial way motivated by or based on the 1855 Louisiana legislature's narrow, archaic and condescending view of the role of women. That view is simply untenable.

While amici curiae are convinced that the 1855 Louisiana legislature's stereotypical view of women -- as reflected among other things in the complete exclusion of women from the political process -- would compel this Court to strike down this law on a substantive Equal Protection Clause challenge, this Court does not have to reach this question. Rather, this Court need only recognize that when the 1855 law was passed, the legislative process was so tainted by prejudice towards women and

by blanket political exclusion that revival of this law without reenactment would be in conflict with the current values of political participation and political equality now held in Louisiana and throughout our country.

The state imposition of an affirmative burden or penalty on a biological correlate of gender, such as prohibitions on the performance of abortions, constitutes a gender-based classification. Where a law makes a sex or race-based classification, heightened scrutiny must be applied to determine whether the state's objective in passing the law is sufficiently important or compelling. Nonetheless, no law or governmental practice, regardless of whether it constitutes a facial classification, can withstand challenge if "the statutory objective itself reflects archaic or stereotypical notions," Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), or a discriminatory purpose, Washington v. Davis, 426 U.S. 229 (1976).

While it is obviously not possible to have first-hand accounts of the events leading up to the passage or amendment of a law passed in 1855, facts as to the overall objectives and similar behavior by the legislature passing the law can be highly relevant in smoking out the motivating forces of the law. In Hunter v. Underwood, 471 U.S. 222, 228-29 (1985), Justice Rehnquist, writing for a unanimous Court, agreed that one of the reasons it was clearly erroneous for a lower court to decide that a moral turpitude law was not passed with discriminatory intent was that the law was part of a 1901 state convention which itself

was "part of a movement that swept the post-Reconstruction South to disenfranchise blacks." 471 U.S. at 228-29.[32]

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[32]The Court specifically found that it did not have to analyze "whether § 182 would be valid if enacted today without any impermissible motivation . . . ." 471 U.S. at 233. Thus, the Court stated, "we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to have this effect. As such, it violates equal protection under Arlington Heights." Id.

In the fundamental rights context, where the Court has specifically identified only one or two interests that will satisfy the compelling governmental interest test, the Court has also focused only on the relevant state actors' actual purpose. Thus, in affirmative action cases, where the Supreme Court has stated that only remedying past discrimination and, in some contexts, promoting diversity are compelling, the Court has insisted on looking to the actual purposes of the plans to see if they are in fact compelling. See City of Richmond v. Croson, 57 U.S.L.W. 4132 (U.S. Jan. 23, 1989). In these cases, the Court examines the actual purpose not simply to see if the purpose is invidious, but to see if even legitimate interests are compelling. See Wygant v. Jackson, 476 U.S. 265 (1986) (finding remedying of societal discrimination legitimate but not compelling where seniority interests of third parties were at stake).

In abortion as with affirmative action, the Supreme Court has identified only a couple of interests that are compelling in this context: protecting potential life and protecting the health of women. In these cases, as well, the Court must look to see if the actual purpose for the passage and design of such laws was for one of these two compelling interests. Thus, even if this law was not infected with a discriminatory purpose, this law could also be struck down because it was passed at least in part for outdated, non-compelling reasons -- e.g., the danger of surgery in 1870 or the use of poison in 1855. Even where minimal scrutiny has been applied, the Court has been unwilling to uphold laws affecting sensitive individual rights where the relationship between the classification and the actual purpose has become "so attenuated as to render the distinction arbitrary and irrational." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985) (White, J., joined by Burger, C.J., Powell, Rehnquist, Stevens, & O'Connor, JJ.); see also Bankers Life & Casualty v. Crenshaw, 108 S.Ct. 1645, 1657, (Blackmun, J., concurring in part & dissenting in part).

For a thorough discussion of how the actual purpose for abortion laws passed in the mid-19th century reflected outmoded concerns about the health risks of surgery and the "proper" role of women, see Abele v. Markle, 342 F. Supp. 800, 806-08 (D. Conn 1972) (Newman, J., concurring).

In this case there is strong and concrete evidence that this 1855 law was part of a state legal scheme in which the legislature of the time allowed a negative and stereotypical view of women to have a profound influence on its treatment of women. (See appendix for selected discriminatory provisions from statutes and constitutions at the time.) These laws sought to enforce a world view that saw women as "destined only for the home and the rearing of children and only men for the marketplace and the world of ideas." Stanton v. Stanton, 421 U.S. 7, 14 (1975).[33] At the time Louisiana passed this abortion law, the 1852 Louisiana Constitution specifically forbade women from voting, La. Const. of 1852, art. 10, as well as from holding elective office in the Louisiana legislature, La. Const. of 1852, art. 6. Women were forbidden to be members of juries, see Taylor v. Louisiana 419 U.S. 522, 533 n.11 (1974), or "witness[es] to testaments," La. Civ. Code art. 1584(1) (Bloomfield 1867). Article 3076 of the Louisiana Civil Code stated that "Women who, on account of their sex, cannot be judges, are likewise incapable of being arbitrators." Another statute stated that: "The wife

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[33]"[S]tatute books gradually became laden with gross stereotyped, distinctions between the sexes and, indeed throughout the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." Frontiero v. Richardson, 411 U.S. 677, 685 (1973). Abortion statutes in the 19th century were also infected by the attitudes of the times as to the "proper role" of women. See generally J. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800-1900 (1978).

is bound to live with her husband and to follow him wherever he chooses to reside." La. Civ. Code art. 122 (Bloomfield 1867). A woman could not "appear in court without the authority of her husband." La. Civ. Code art. 123 (Bloomfield 1867). In the very year the Louisiana legislature enacted the 1855 prohibition on all abortions, the legislature also passed a law allowing women to "borrow money or contract debts for their separate benefit only "with the authorization of the husband." La. Civ. Code. art 127 §1 (Bloomfield 1867). See also Kirchberg v. Feenstra, 450 U.S. 455, 457 n.1 (1981) (invalidating Louisiana statute that stated, "The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife.").

Even if these clearly discriminatory laws, created and maintained by the same legislatures who passed and amended § 14:87, do not alone themselves constitute a conclusive showing of unconstitutional gender discrimination, these facts would clearly shift the burden to the government to establish that a discriminatory purpose was not a motivating factor in the passage or design of this statute. See Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (where governmental actors have group, and where the acts of those same actors have other negative or disproportionate effects on that group, the burden of persuasion shifts to the government to prove that these other

acts were not discriminatory).[34]

Amici Curiae believe that § 14:87 violates the Equal Protection Clause. As this 60(b) motion calls for the Court to exercise its equitable discretion, the strong likelihood that the law was passed with a discriminatory purpose is sufficient reason for this Court to refuse to revive this law. Relevant to both the Equal Protection Clause and the equitable analysis is the fact that this law was passed at time when the female citizens of Louisiana were completely disenfranchised from the political system. If the right to choose to terminate a pregnancy is to be returned to the political process, it should be returned to the open political process of today to decide what laws should be enacted to govern the people of Louisiana.

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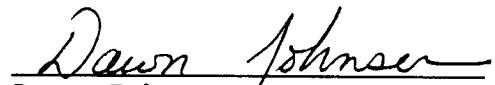
[34]The fact that this law has never made any exceptions for abortions necessary to save the life of the pregnant women also indicates that at least the shape this law took was impermissibly influenced by discriminatory attitudes. No member of the Supreme Court has ever suggested that it would be permissible to devise abortion laws that did not make any exception for the life and health of the pregnant women. There is no precedent in American law that requires men to risk their lives or their health to rescue or save even their children. Regan, Rewriting Roe v. Wade, 77 Mich. L. Rev. 1569 (1979).

CONCLUSION

For the reasons stated above, amici curiae respectfully urge this Court to deny movant's Rule 60(b)(5) motion.

Dated: Washington, D.C.
November 13, 1989

Respectfully submitted,



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APPENDIX

La. Civ. Code art. 25 (Bloomfield 1867). -- "Men are capable of all kinds of engagements and functions, unless disqualified by reasons and causes applying to particular individuals. Women cannot be appointed to any public office, nor perform any civil functions, except those which the law specially declares them capable of exercising."

La. Civ. Code art. 322 (Bloomfield 1867). -- "The following persons cannot be tutors, to wit:

1. Slaves.
2. Minors, except the father and mother.
3. Women, except the mother and grandmother.
4. Idiots and lunatics."

La. Civ. Code art. 1102 (Bloomfield 1867). -- "The witnesses assisting at public inventories must be males of age, and domiciliated in the place where the inventories are made."

La. Civ. Code art. 1584 (Bloomfield 1867). -- "The following persons are absolutely incapable of being witnesses to testaments:

1. Women of what age soever;
2. Male children who have not attained the age of sixteen years complete;
3. Persons insane, deaf, dumb or blind,
4. Persons whom the criminal laws declare incapable of exercising civil functions;
5. Slaves."

La. Civ. Code art. 3075 (Bloomfield 1867). -- "Women who, on account of their sex, cannot be judges, are likewise incapable of being named arbitrators."

La. Civ. Code art. 2922 (Bloomfield 1867). -- "If the depositor has changed condition, as if a woman marries, or a person of full age falls under interdiction, the deposit can be restored only to the person who has the administration of the rights and property of the depositor."

La. Civ. Code art. 122 (Bloomfield 1867). -- "The wife is bound to live with her husband and to follow him wherever he chooses to reside; the husband is obliged to receive her and to furnish her with whatever is required for the conveniences of life, in proportion to his means and conditions."

La. Civ. Code art. 123 (Bloomfield 1867). -- "The wife cannot appear in court without the authority of her husband, although she may be a public merchant, or possess her property separate from her husband."

La. Civ. Code art. 124 (Bloomfield 1867). -- "The wife, even when she is separate in estate from her husband, cannot alienate, grant, mortgage or acquire either by gratuitous or incumbered title, unless her husband concurs in the act, or yields his consent in writing."

La. Civ. Code art. 126 (Bloomfield 1867). -- "If the husband refuses to empower his wife to appear in court, the judge may give such authority."

La. Civ. Code art. 127 (Bloomfield 1867). -- "If the husband refuses to empower his wife to contract, the wife may cause him to be cited to appear before the judge, who may authorize her to make such contract, or refuse to empower her, after the husband has been heard, or has made default....

Sec. 1.-Be it enacted, &c., That from and after the passage of this Act all married women in this State, over the age of twenty-one years, may, by and with the authorization of their husbands, borrow money or contract debts for their separate benefit and advantage, and to secure the same, grant mortgages or other securities effecting their separate estate, paraphernal or dotal; provided it is done in the form and for the objects presented in the following sections of this act."

La. Civ. Code art. 134 (Bloomfield 1867). -- "The wife shall not be at liberty to contract another marriage until ten months after the dissolution of her preceding marriage."

La. Civ. Code art. 136 (Bloomfield 1867). -- "The husband may claim a separation, in case of adultery on the part of the wife."

La. Civ. Code art. 137 (Bloomfield 1867). -- "The wife may also claim a separation in case of adultery on the part of her husband, when he has kept his concubine in their common dwelling."

La. Civ. Code art. 145 (Bloomfield 1867). -- "If the wife, who sues for a separation, has left or declared her intention to leave the dwelling of her husband, the judge shall assign the house wherein she shall be obliged to dwell until the determination of the suit.

The wife shall be subject to prove her said residence as often as she may be required to do so, and in case she fails so to do, every proceeding on the separation shall be suspended."

La. Civ. Code art. 146 (Bloomfield 1867). -- "If the wife has not a sufficient income for her maintenance during the suit for separation, the judge shall allow her a sum for her support, proportioned to the means of the husband.

The husband cannot be compelled to pay this allowance,

unless the wife proves that she has constantly resided in the house appointed by the judge."

La. Civ. Code art. 2411 (Bloomfield 1867). -- "The wife, whether separated in property by contract or judgment, or not separated, cannot, except by and with the authorization of the husband, and in default of the husband, with that of the judge, alienate her immovable effects of whatever nature they may be, before the dissolution of the marriage, except in cases where the alienation of the dotal immovable is permitted."

La. Civ. Code art. 727 (Bloomfield 1867). -- "It is not sufficient to be an owner in order to establish a servitude; one must be master of his rights and have the power to alienate; for the creation of a servitude is an alienation of a part of the property.

Thus minors, married women, persons interdicted, cannot establish servitudes on their estates, except according to the forms prescribed for the alienation of their property."

La. Civ. Code art. 867 (Bloomfield 1867). -- "Succession is the transmission of the rights and obligations of the deceased to the heirs."

La. Civ. Code art. 999 (Bloomfield 1867). -- "The acceptance of a succession by a married woman without the authorization of her husband or of the judge, is not valid."

La. Civ. Code art. 1000 (Bloomfield 1867). -- "If the wife should refuse to accept an inheritance, her husband, who has an interest to have it accepted, in order to increase the revenues of which he has the enjoyment during the matrimony, may, at his risk, accept it on the refusal of his wife."

La. Civ. Code art. 1012 (Bloomfield 1867). -- "A woman, under the power of her husband, cannot refuse the inheritance falling to her share, unless she is duly authorized to that effect by her husband, or, on the denial of her husband, by the judge."

La. Civ. Code art. 1239 (Bloomfield 1867). -- "Married women, even if they be separated in estate, cannot institute a suit for partition without the authorization of their husbands or of the judge.

But no authorization is necessary, if they are separated from bed and board, or divorced from their husbands."

La. Civ. Code art. 1240 (Bloomfield 1867). -- "The husband can, without the concurrence of his wife, cause the definitive partition of the movable effects of the succession falling to her, if, by the marriage contract, her present and future effects are settled on her as dowry."

La. Civ. Code art. 1467 (Bloomfield 1867). -- "A married woman cannot make a donation inter vivos without the concurrence or special consent of her husband, or unless she be authorized by the judge, conformably to what is prescribed under the title of husband and wife.

But she needs neither the consent of her husband nor any judicial authorization to dispose by donation mortis causa."

La. Civ. Code art. 1532 (Bloomfield 1867). -- "A married woman cannot accept a donation without the consent of her husband, and in case of the husband's refusal, without being authorized by the judge, conformably to what is prescribed in the title of husband and wife."

La. Civ. Code art. 1657 (Bloomfield 1867). -- "A married woman cannot accept a testamentary executorship without the consent of her husband.

If there is between them a separation of property, she may accept it with the consent of her husband, or, on his refusal, she may be authorized by the court, conformably to what is prescribed by the title of husband and wife."

La. Civ. Code art. 1775 (Bloomfield 1867). -- "All persons have the capability to contract, except those whose incapacity is specially declared by law. These are persons of insane mind, slaves, those who are interdicted, minors, married women."

La. Civ. Code art. 1779 (Bloomfield 1867). -- "The incapacity of the wife is removed by the authorization of the husband, or, in cases provided by law, by that of the judge."

La. Civ. Code art. 2329 (Bloomfield 1867). -- "The income of proceeds of the dowry belong to the husband, and are intended to help him to support the charges of the matrimony, such as the maintenance of the husband and wife, that of their children, and other expenses which the husband deems proper."

La. Civ. Code art. 2330 (Bloomfield 1867). -- "The husband alone has the administration of the dowry, and his wife cannot deprive him of it; he may act alone in a court of justice, for the preservation or recovery of the dowry, against such as either owe or detain the same, but this does not prevent the wife from remaining the proprietor of the effects which she brought as her dowry."

La. Civ. Code art. 2334 (Bloomfield 1867). -- "If the dowry, or part of it, should consist in movable effects, valued by the marriage contract without declaring that the estimated value of the same does not constitute a sale, the husband becomes the proprietor of such movable effects, and owes nothing but the estimated value of the same."

La. Civ. Code art. 2338 (Bloomfield 1867). -- "The wife may, with the authorization of her husband, or, on his refusal, with the authorization of the judge, give her dotal effects for the establishment of the children she may have by a former marriage; but if she be authorized only by the judge, she is bound to reserve the enjoyment to her husband."

La. Civ. Code art. 2339 (Bloomfield 1867). -- "She may likewise, with the authorization of her husband, give her dotal effects for the establishment of their common children."

La. Const. of 1845, art. 6. -- "No person shall be a representative who, at the time of his election, is not a free white male, and has not been for three years a citizen of the United States, and has not attained the age of twenty-one years, and resided in the State for the three years next preceding the election, and the last year thereof in the parish for which he may be chosen." (emphasis added)

La. Const. of 1845, art. 10. -- "In all elections by the people, every free white male, who has been two years a citizen of the United States, who has attained the age of twenty-one years, and resided in the State two consecutive years next preceding the election, and the last year thereof in the parish in which he offers to vote, shall have the right of voting: Provided, That no person shall be deprived of the right of voting who at the time of the adoption of this constitution was entitled to that right under the constitution of 1812. Electors shall in all cases, except treason, felony, breach of surety of the peace, be privileged from arrest during their attendance at, going to, or returning from elections."

La. Const. of 1845, art. 95. -- "All civil officers for the State at large shall reside within the State, and all district or parish officers within their districts or parishes, and shall keep their offices at such places therein as may be required by law. And no person shall be elected or appointed to any parish office who shall not have resided in such parish long enough before such election or appointment to have acquired the right of voting in such parish; and no person shall be elected or appointed to any district office who shall not have resided in such district, or an adjoining district, long enough before such appointment or election to have acquired the right of voting for the same."

La. Const. of 1852, art. 8. -- "Every duly-qualified elector under this constitution shall be eligible to a seat in the general assembly: Provided, That no person shall be a representative or senator, unless he be, at the time of his election, a duly-qualified voter of the representative or senatorial district from which he is elected."

La. Const. of 1852, art. 10. -- "Every free white male who has attained the age of twenty-one years, and who has been a resident of the State twelve months next preceding the election, and the last six months thereof in the parish in which he offers to vote, and who shall be a citizen of the United States, shall have the right of voting, but no voter, on removing from one parish to another within the State, shall lose the right of voting in the former until he shall have acquired it in the latter. Electors shall in all cases, except treason, felony, or breach of the peace, be privileged from arrest, during their attendance at, going to, or returning from elections."

La. Const. of 1852, art. 35. -- "The supreme executive power of the State shall be vested in a chief magistrate, who shall be styled the governor of the State of Louisiana. He shall hold his office during the term of four years, and, together with the lieutenant-governor, chosen for the same term, be elected as follows: The qualified electors for representatives shall vote for a governor and lieutenant-governor, at the time and place of voting for representatives."

La. Const. of 1864, art. 8. -- "Every duly-qualified elector under this constitution shall be eligible to a seat in the general assembly: Provided, That no person shall be a representative or senator unless he be, at the time of his election, a duly-qualified voter of the representative or senatorial district from which he is elected."

La. Const. of 1921, art, § 41. -- "Selection of jurors; women jurors; trial by judge; trial by jury

Section 41. The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

La. Const. of 1868, art. 118. -- "Taxation shall be equal and uniform throughout the State." ... The General Assembly shall levy a poll tax on all male inhabitants of this State, over twenty-one years old, for school and charitable purposes, which tax shall never exceed one dollar and fifty cents per annum."

La. Const. of 1868, art. 141. -- "One half of the funds derived from the poll tax, herein provided for, shall be appropriated exclusively to the support of the free public schools, throughout the State, and the University of New Orleans."

La. Const. of 1868, art. 138. -- "The general exercises in the public schools shall be conducted in the English language."

La. Const. of 1868, art. 139. -- "No appropriation shall be made by the General Assembly for the support of any private school, or any private institution of learning, whatever."

La. Civ. Code art. 2360 (Bloomfield 1867). -- "All property, which is not declared to be brought in marriage by the wife, or to be given to her in consideration of the marriage, or to belong to her at the time of the marriage, is paraphernal."

Taylor v. Louisiana, 95 S.Ct. 692, 699 n.13 (1975). This is a relatively modern development. Under the English common law, women, with the exception of the trial of a narrow class of cases, were not considered to be qualified for jury service by virtue of the doctrine of propter defectum sexus, a "defect of sex." 3 W. Blackstone, commentaries *362. This common-law rule was made statutory by Parliament in 1870, 33 & 34 Vict., c. 77, and then rejected by Parliament in 1919, 9 & 10 Geo. 5, c. 71. In this country women were disqualified by state law to sit as jurors until the end of the 19th century. They were first deemed qualified for jury service by a State in 1898, Utah Rev. Stat. Ann., Tit. 35, § 1297 (1898). Today, women are qualified as jurors in all the States. The jury-service statutes and rules of most States do not on their face extend to women the type of exemption presently before the Court, although the exemption of provisions of some States do appear to treat men and women differently in certain respects."