

LIFE AND THE LOUISIANA SUPREME COURT: A DRAMATIC RESCUE TELLS IT ALL

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In August 2005, Hurricane Katrina devastated the coast of Louisiana and led to massive flooding, destruction, and loss of life in New Orleans. One of the more dramatic rescue stories came from New Orleans, two weeks after the hurricane hit, when – in response to an order by the Governor of Louisiana - doctors, Louisiana State Police Officers, Louisiana National Guardsmen, and Illinois Conservation Officers took flat bottom boats into the city to save the lives of thousands of frozen embryos at a flooded hospital.²

The actions of the Governor and those involved in the dramatic rescue evidence the strong respect of the people of Louisiana for life, even in its tiniest form. Dr. Richard Dickey, Medical Director and Founder of the Fertility Institute of New Orleans, guardian³ of the embryos, noted that “[Louisiana is] the only state where embryos are protected by law ... this is a very serious responsibility that we take.”⁴ The mother of one of the embryos later born alive, Rebecca Markham, said, "We see our little boy - we see what the potential of those little embryos is. It meant more to us than a few cells frozen in a hospital."⁵

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² Marc Lallanilla, *Katrina Rescue Team Saves Abandoned Embryos: More Than 1,000 Fertilized Embryos Saved From an Empty Hospital in New Orleans*, ABC NEWS (Sept. 22, 2005), at <http://abcnews.go.com/Health/print?id=1145996>. From this group of rescued embryos, at least seven babies have been born. Charlene Israel, *Embryo Rescued in Katrina Flood Born*, CBN NEWS (Jan. 17, 2007), at <http://www.cbn.com/cbnnews/88408.aspx?option=print>.

³ See LA. REV. STAT. § 9:126, 130 (West 2007).

⁴ Meg Farris, *Medical Watch: Doctors, State Police Staged Daring Rescue of Fertility Clinic Post-Katrina*, WWLTV.COM (OCT. 26, 2006), at <http://www.wwltv.com/topstories/stories/wwl102606khembryos.776c01bd.html#>.

⁵ See Janet McConnaughey, *Katrina Embryo Now Noah*, DESERET MORNING NEWS (JAN. 17, 2007), available at <http://deseretnews.com/dn/print/1,1442,650223586,00.html>.

I. LIFE ISSUES

It is the stated policy of the state of Louisiana that “human life is of the highest and inestimable value.”⁶ Life has long been considered to begin at the point of conception⁷ and an embryo has never been considered simply a “piece of tissue from the mother’s body.”⁸ While *in ventre sa mere*, a child is protected from criminal violence⁹ has the right to inherit,¹⁰ and has the right to recover for injury, pain, and suffering,¹¹ while the parents have a right to recover for its wrongful death.¹² But for the United States Supreme Court (“USSC”) decision in *Roe v. Wade*,¹³ abortion would be illegal in Louisiana, except to save the life of the mother.¹⁴ Louisiana is now the first state to criminalize partial birth abortion.¹⁵ Furthermore, Louisiana has some of the most unique and restrictive laws in the United States regarding stem cell research.¹⁶ The only three areas where Louisiana comes up somewhat lacking at this point in time are cloning, life support and, arguably, the use of abortifacients.

⁶ Natural Death Act, LA. REV. STAT. § 40:1299.58.10(E) (West 2007).

⁷ See A.N. Yiannopoulos, Reporter for the Louisiana State Law Institute Committee for the Revision of the Louisiana Civil Code of 1870, Book I, Testimony Before the Senate Committee on Judiciary A (June 2, 1987), cited in *Bailey v. Khoury*, 891 So. 2d 1268, 1288 n.3 (La. 2005); see also Art. 7 of the La. Civil Code of 1808 (“Children in their mother’s womb, cannot be reckoned among the number of children. . . . Yet the hope that such children may be born alive, cause them to be considered, in whatever relates to themselves, as if they were already born.”).

⁸ See *Danos v. St. Pierre*, 402 So. 2d 633 (La. 1981) (on rehearing) (quoting *Johnson v. South N.O. Lt. & Traction Co.*, No. 9,048 (Orl. App. 1923), *cert. den.* No. 26,443 (La. 1924)) (“The argument of the defendant is that the infant before it is born is not a child, not a human being, that it is only a thing, a part of the anatomy of the mother, as are her organs. We cannot accept that theory.”).

⁹ See LA. REV. STAT. § 32.5-.8 (West 2007).

¹⁰ LA. CIV. CODE art. 1482 (1870) (repealed); see also LA. CIV. CODE ANN. art. 1474 (West 2007) (“To be capable of receiving by donation *inter vivos*, an unborn child must be in utero at the time the donation is made. To be capable of receiving by donation *mortis causa*, an unborn child must be in utero at the time of the death of the testator. In either case, the donation has effect only if the child is born alive.”).

¹¹ See *Bailey v. Khoury*, 891 So. 2d 1268 (La. 2005).

¹² See *Danos v. St. Pierre*, 402 So. 2d 633 (La. 1981) (on rehearing).

¹³ 410 U.S. 113 (1973).

¹⁴ See Human Life Protection Act, LA. REV. STAT. § 40:1299.30 (West 2007); LA. REV. STAT. § 14:87 (West 2007).

¹⁵ See LA. REV. STAT. § 14:32.10 (West 2007) (prohibiting partial birth abortion unless necessary to save the life of the mother). The same Act created a cause of action in tort against the doctor performing the abortion. See LA. REV. STAT. § 40:1299.35.17 (West 2007).

¹⁶ See Jennifer L. Enmon, *Stem Cell Research: Is the Law Preventing Progress?*, 2002 UTAH L. REV. 621, 637 (2002); Allison B. Newhart, Note, *The Intersection of Law and Medicine: The Case of Providing Federal Funding For Embryonic Stem Cell Research*, 49 VILL. L. REV. 329, 340 (2004).

Abortion

The Court has never directly ruled on the constitutionality of any of Louisiana's abortion provisions.¹⁷ However, Louisiana has long protected the unborn child,¹⁸ so it should come as no surprise that, as early as 1981, Louisiana enacted a provision reaffirming the position of Louisiana that the unborn child is a human being from the time of conception and entitled to the right to life from that point and proclaiming its intention to regulate abortion to the extent permitted by the USSC.¹⁹ As recently as the 2005 legislative session, the Louisiana Legislature enacted the Human Life Protection Act,²⁰ in hope and anticipation of the USSC's overruling or, at least, further restricting *Roe*. The Act provides that its provisions will become effective immediately upon, and to the extent permitted by, the occurrence of any of the following circumstances: (1) Any decision of the USSC which reversed, in whole or in part, *Roe v. Wade* or (2) the adoption of an amendment to the United States Constitution which, in whole or in part, restores to the state of Louisiana the authority to prohibit abortion.²¹

Should either happen, the Act provides that no person may knowingly use or employ any instrument or procedure upon a pregnant²² woman with the specific intent of causing or abetting the termination of the life of an unborn human being.²³ It gives physicians two very limited defenses: (1) where the procedure is necessary to prevent the substantial risk of death due to a physical condition or serious, permanent impairment of a life-sustaining organ of the pregnant woman,²⁴ or (2) where the death of the unborn child [is] due to accidental or

¹⁷ The closest it has come was in *Women's Health Clinic v. State*, 825 So. 2d 1208 (La. Ct. App. 2002) *writs denied per curiam*, 828 So. 2d 586 (La. 2002) where it had an opportunity to declare the abortion tort statute unconstitutional but denied writs. All current justices except Weimer sat on this court.

¹⁸ Louisiana's earliest enacted abortion statute was adopted in 1888. See LA. REV. STAT. § 14:87 (West 2007).

¹⁹ LA. REV. STAT. § 40:1299.35.0 (West 2007). In 1988, the legislature also passed a concurrent resolution reaffirming its intent that the district attorneys throughout the state prosecute abortion to the fullest extent allowed by the U.S. Constitution.

²⁰ LA. REV. STAT. § 40:1299.30(J) (West 2007).

²¹ See LA. REV. STAT. § 40:1299.30(A) (West 2007).

²² Pregnancy is defined as "the human female reproductive condition, of having a living unborn human being within her body throughout the entire embryonic and fetal stages of the unborn child from fertilization to full gestation and childbirth." *Id.* § 40:1299.30(I)(1).

²³ *Id.* § 40:1299.30(F)

²⁴ *Id.* § 40:1299.30(F)

unintentional injury.²⁵ It also requires physicians to make reasonable medical efforts to preserve both the life of the mother and the life of the unborn child.²⁶ The criminal penalties for performing an abortion are found in La. R.S. 14:87.²⁷

Up until that time, though,²⁸ Louisiana regulates abortions to the extent legally possible through a collection of twenty-seven statutes.²⁹ Although there is currently no enforceable prohibition of abortion pre-viability, no public funds may be used to effect an abortion then or at any other stage except to prevent the death of the mother or in the case of pregnancy due to rape or incest.³⁰ In *Hope Medical Group for Women v. Edwards*,³¹ the plaintiffs sued the State of Louisiana on behalf of themselves and Medicaid-eligible women of the state to enjoin Louisiana from enforcing the public funding statute and to reimburse plaintiff-Zora H the cost of her abortion. The issue was whether Louisiana could refuse to fund abortions

²⁵ *Id.* § 40:1299.30(G)

²⁶ *Id.*

²⁷ See LA. REV. STAT. § 14:87 (West 2007) (part of the Criminal Code); LA. REV. STAT. § 40:1299.30(D) (West 2007) (providing that any violation of the act is to be prosecuted pursuant to LA. REV. STAT. § 14:87). Shortly after *Roe* was decided, four actions were filed in the federal court for the Eastern District of Louisiana challenging the constitutionality of LA. REV. STAT. § 14:87 (abortion), 14:87.4 (prohibiting advertisement of abortion services), and 14:88 (prohibiting distribution of abortifacients). The cases were consolidated and, in an unreported decision in 1976, a three-judge panel held that the statutes at issue were unconstitutional and enjoined their enforcement. See *Weeks v. Connick*, 733 F. Supp. 1036, 1037 (E.D. La. 1990) (citing *Weeks v. Connick* and consolidated cases, E.D. La. (Jan. 26, 1976)). After *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the state sought an order dissolving the injunction. The U.S. district court held that Louisiana had impliedly repealed its criminal abortion statute when it enacted a series of statutes containing detailed regulations governing abortions. See *Weeks*, 733 F. Supp. at 1037. Thus, the next year the statute was re-enacted by an override vote of both houses of the Legislature after it was vetoed by the Governor. It was, again, declared unconstitutional in 1992 in *Sojourner, T. et al. v. Roemer*, 772 F. Supp. 930 (E.D.La. 1991) *aff'd sub nom.* *Sojourner T. v. Edwards*, 974 F.2d 27 (5th Cir. 1992), *cert. denied*, 507 U.S. 972 (1993), and, again, re-enacted in 2006, as part of the Human Life Protection Act.

²⁸ There should be some question as to what effect LA. REV. STAT. § 40:1299.30 (West 2007) will have on these other statutes when it springs into action. Arguably, it will impliedly repeal them (see discussion below). Whether that repeal would be in part or in toto is uncertain.

²⁹ See LA. REV. STAT. § 40:1299.31–34 (West 2007) (no discrimination for refusal to provide); *id.* §§ 33-34.5 (no use of public funds); *id.* § 35.0 (intent); *id.* § 35.1 (definitions); *id.* § 35.2-.4, .12, .14, .15 (physician responsibilities); *id.* § 35.5 (minors); *id.* §§ 35.6, .14 (right to know); *id.* § 35.7 (rape/incest); *id.* § 35.8-.11 (reports/records/forms); *id.* § 35.13 (experimentation); *id.* § 35.17 (partial birth abortion); *id.* § 35.18 (penalties); LA. REV. STAT. § 14:87 (West 2007) (crime of abortion); 14:87.1 (killing a child during delivery); 14:87.2 (human experimentation); 14:87.4 (abortion advertising); and 14:87.5 (intentional failure to sustain life and health of aborted viable infant).

³⁰ See LA. REV. STAT. § 40:1299.34.5; see also LA. REV. STAT. § 40:1299.33 (no governmental assistance); *id.* § 40:1299.35.7 (requiring reporting of the rape/incest to the police in addition to other conditions).

³¹ 860 F. Supp. 1149 (E.D. La. 1994), *stay denied*, 512 U.S. 1301 (Scalia, J.), *aff'd*, 63 F.3d 418, *reh'g denied, cert. denied* 517 U.S. 1104. See also *Dalton v. Little Rock Family Planning Services*, 516 U.S. 474 (1996).

when the pregnancy is the result of rape or incest which would be at variance with the Hyde Amendment. The court held that Louisiana's provision conflicted with the Hyde Amendment and enjoined enforcement of R.S. 40:1299.34.5 at any time at which Louisiana was accepting federal funds pursuant to Title XIX. After this decision was rendered, the statute was amended to add rape and incest but with a triggering provision that would delete that coverage if and when the federal requirement changes.

Louisiana is the first state post-*Carhart v. Gonzales* to enact an enforceable partial birth abortion statute which would only allow the procedure to save the life of the mother.³² It also created a cause of action in tort against the doctor performing a partial birth abortion.³³ In fact, two Acts were passed and signed by the Governor creating the same statutes but with slight differences in each.³⁴ By law, the last passed should be the one which becomes law but this idiosyncrasy could create a situation wherein abortion proponents might challenge the statute in the Louisiana courts.

La. R.S. 40:1299.30E provides that nothing in the section may be construed to prohibit the sale, use, prescription, or administration of a contraceptive measure, drug or chemical, if it is administered prior to the time when a pregnancy could be determined through conventional medical testing and if the contraceptive measure is sold, used, prescribed, or administered in accordance with manufacturer instructions. Thus, it would appear that the use of RU-486, which is currently available in Louisiana, is not prohibited. Although the Attorney General has issued an opinion authorizing its use,³⁵ no court has ruled.

Louisiana enacted its initial "Right to Know" law in 1978; however, it was quickly found to be an unconstitutional infringement on a woman's right to an abortion.³⁶ After the Supreme Court's decision in *Planned Parenthood v. Casey*,³⁷ the Legislature again enacted a

³² In fact there are two. LA. REV. STAT. § 14:32.10 (West 2007); LA. REV. STAT. § 40:1299.35.17A (West 2007).

³³ See LA. REV. STAT. § 40:1299.35.17C (2007). (*repealed* 1980 La. Acts 418 § 2)

³⁴ H.B. No. 614 (La. 2007); S.B. No. 161 (La. 2007).

³⁵ Op. La. Att'y Gen. No. 00-421 (Mar. 19, 2001).

³⁶ *Margaret S. v. Edwards*, 488 F. Supp. 181 (E.D. La. 1980); *Margaret S. v. Treen*, 597 F. Supp. 636 (E.D. La. 1984), *aff'd*, 794 F.2d 994 (5th Cir. 1986).

³⁷ 505 U.S. 833 (1992).

lengthy “Woman’s Right to Know” statute³⁸ containing both civil and criminal penalties.³⁹ There has been no challenge as of yet to that statute.⁴⁰ In 2007, provisions were added to that statute requiring that a woman be informed that at twenty weeks gestational age an unborn child has the physical structures necessary to experience pain, to offer the woman the choice of providing anesthetic to the unborn child, and to allow the woman the right to view an ultrasound.⁴¹ Because two separate acts were adopted and signed by the Governor, a challenge to these provisions can be expected in state court.

A minor is allowed to get an abortion in this state without parental consent but a demanding hearing before a juvenile judge is required and the judge has the power to say no.⁴²

³⁸ See LA. REV. STAT. § 40:1299.35.6 (West 2007). These requirements do not apply when a medical emergency compels the immediate performance of an abortion because the continuation of the pregnancy poses an immediate threat and grave risk to the life or permanent physical health of the pregnant woman. See LA. REV. STAT. § 40:1299.35.12 (West 2007).

³⁹ “Whoever violates the provisions of this Part shall be fined not more than one thousand dollars, or imprisoned for not more than two years, or both.” LA. REV. STAT. § 40:1299.35.18

⁴⁰ *But see* LW v. Delta Clinic of Baton Rouge, Inc., No. 2006 CA 0134, 2007 WL 866478 (La. Ct. App. 2007) (Abortion patient sued in tort and for lack of information provided. Court held that for purpose of this statute, abortion does not include the removal of an already dead fetus. Death of fetus was a disputed factual issue which could not be determined on summary judgment. However, cause of action appeared to be alive and well in Louisiana.).

⁴¹ See 2007 La. Sess. Law Serv. Act 282 (H.B. No. 25) (WEST); see also LA. REV. STAT. § 40:1299.35.2(C) (West 2007) (“In order to preserve the health of the woman and to determine the gestational age, weight, and lung maturity of the unborn child, the physician intending to terminate a pregnancy he reasonably believes to be of twenty or more weeks gestation must cause to be performed an ultrasound examination of the unborn child.”)

⁴² LA. REV. STAT. § 40:1299.35.5 (West 2007) (enacted in 1978, amended in 1980, 1981, 1995, and 1997). These requirements do not apply when a medical emergency compels the immediate performance of an abortion because the continuation of the pregnancy poses an immediate threat and grave risk to the life or permanent physical health of the pregnant woman; see LA. REV. STAT. § 40:1299.35.12 (West 2007). The minor must fill out a state-prepared application. Each application must be heard in chambers, anonymously, in a summary manner, within four days of the filing thereof. Prior to the hearing, the court may require the minor to participate in an evaluation and counseling session with a mental health professional for the purpose of developing a trustworthy and reliable expert opinion concerning the minor’s sufficiency of knowledge, insight, judgment, and maturity with regard to her abortion decision. If the court finds, by clear and convincing evidence, that the minor is sufficiently mature and well enough informed to make the decision concerning the abortion on her own, the court shall issue an order authorizing the minor to act on the matter without parental consultation or consent. If the court finds that the minor is not sufficiently mature and well enough informed to make a decision intelligently among the alternatives, the court shall decide whether or not it would be in the best interest of the minor to notify her parents or guardian of the proceedings. If the court finds that it is in the minor’s best interest to notify her parents or guardian, the court shall so notify and reconvene the proceedings within forty-eight hours with the parents or guardian present. If the court finds that the minor is not sufficiently mature and well enough informed to make the decision concerning the abortion and further finds that it would not be in the minor’s best interest to notify her parents or guardian, the court shall issue an order authorizing the abortion if the court finds, by clear and convincing evidence, that the abortion

Although earlier versions of the statute were held unconstitutional,⁴³ Louisiana's current statute was cited with favor by the U.S. Supreme Court in *Ayotte v. Planned Parenthood of Northern New England*.⁴⁴ There have been no challenges to the current version of the statute.

In *State v. Aguillard*,⁴⁵ abortion clinic protestors were arrested and contended their actions were justifiable as "defense of others,"⁴⁶ an attempt to protect unborn children incapable of protecting themselves. The appellate court noted that the "defense of others" statute limits the use of force or violence in protection of others to situations where the person attacked would have been justified in using such force or violence to protect themselves and that since abortion is legal in Louisiana, "the defendants had no legal right to protect the unborn by means not even available to the unborn themselves."⁴⁷ The Court denied writs in this decision.

Protection of the Unborn From Criminal Violence

Louisiana law currently protects unborn children from criminal violence, but it has been a tortured semantic path to get there.

For the most part, Louisiana law is based on European civil law; however, its criminal law is based on the common law of England.⁴⁸ In one of the first cases dealing with the death of an unborn child by violence,⁴⁹ the Court recognized that common law murder "contemplates the killing of those human beings who have been born alive and who thus have an existence independent of their mothers at the time of their death and, thus, a man who killed an unborn

would be in the best interest of the minor. However, the court may deny the abortion request of an immature minor in the absence of parental consultation if it concludes that her best interests would be served thereby.

⁴³ Margaret S. v. Edwards, 488 F. Supp.181 (E.D. La. 1980); Margaret S. v. Treen, 597 F. Supp. 636 (E.D. La. 1984), *aff'd*, 794 F.2d 994 (5th Cir. 1984).

⁴⁴ 546 U.S. 320, 326 n.1 (2006).

⁴⁵ 567 So. 2d 674 (La. Ct. App. 1990), *cert. denied*, 571 So. 2d 631 (La. 1990).

⁴⁶ LA. REV. STAT. § 14:22 (West 2007).

⁴⁷ 567 So. 2d at 677 (emphasis added).

⁴⁸ See Acts Passed at the First Session of the Legislative Council of the Territory of Orleans, ch. L at 416 (1805), approved May 4, 1805, and successor acts which expressly provided in Section 33: "All the crimes, offences [sic] and misdemeanors herein before, shall be taken, intended and construed, according to and in conformity with the common law of England."

⁴⁹ *State v. Gyles*, 313 So. 2d 799 (La. 1975). (The defendant struck a pregnant woman with a stick and his fist. About 8 hours after the beating, a male child was stillborn. At the time of the beating, the woman was 8 months pregnant.)

child was not guilty of murder.”⁵⁰ Notably, Justice Calogero concurred but said, “I have to follow the law [because] . . . I do not think it is appropriate for this Court to legislate judicially, [but] . . . I would not hesitate to interpret the statute as proscribing the killing of an eight and one half month unborn fetus, for I believe that such an unborn child is indeed a human being.”⁵¹

In 1976, the Legislature amended the definitional section of the criminal code to provide that a “person” includes a human being from the moment of fertilization and implantation.⁵² It did not, however, amend the homicide statute, which continued to provide that homicide was the killing of a “human being.”⁵³ In 1979, the Court, in *State v. Brown*⁵⁴ held that the amendment to the word “person” did not affect the law of homicide since a homicide continued to be the killing, not of a “person,” but of a “human being.”⁵⁵ For whatever reason, a feticide statute was not enacted in Louisiana until 1989. In that year, four statutes were finally enacted proscribing the killing of a unborn child.⁵⁶

The key issue relative to the feticide statutes has been whether a defendant can be convicted of killing both the mother and the unborn child without violating the double jeopardy “same evidence” test. In *State v. Smith*,⁵⁷ the defendant was charged with second degree feticide and second degree murder due to the strangulation of the mother. The Fourth Circuit held that since second degree feticide, a felony-murder statute, required the state to prove the felony murder of the mother, the same evidence was used to convict the defendant of the murder of the mother and of the child and, thus, conviction for the feticide violated the double jeopardy clauses

⁵⁰ *Id.* at 800–02. It noted, however, that if the defendant’s intent had been to procure a premature delivery of the fetus, he could have been prosecuted under the abortion statute. *Id.* at 800, n.1.

⁵¹ *Id.* at 802. Justice Calogero also suggested that the legislature amend the statute to specifically provide for the killing of an unborn viable fetus. *Id.* Justice Summers (retired) would have found the fetus to be a human being and convicted the defendant of 2nd degree murder. He dissented.

⁵² LA. REV. STAT. § 14:2(A)(7) (West 2007).

⁵³ LA. REV. STAT. § 14:29 (West 2007). *See also*, LA. REV. STAT. §§ 14:30, 30.1 (West 2007).

⁵⁴ 378 So. 2d 916 (La. 1979) (Defendant killed pregnant woman and her unborn child).

⁵⁵ *Id.* at 917. The Court noted that “[i]f the homicide statutes are to be amended to include feticide it must be done with greater clarity and less confusion . . . and within the limits fixed in *Roe v. Wade*.” *Id.* at 918.

⁵⁶ LA. REV. STAT. § 14:32.5 (West 2007) (“Feticide is the killing of an unborn child by the act, procurement, or culpable omission of a person other than the mother of the unborn child.”); *id.* § 14:32.6 (First degree feticide: intentional or felony murder; penalty up to 15 years); *id.* § 14:32.7 (Second degree feticide: manslaughter or lesser felony/misdemeanor murder; penalty up to 10 years); *id.* § 14:32.8 (Third degree feticide: negligent homicide; penalty up to 5 years).

⁵⁷ 647 So. 2d 1321 (La. Ct. App. 1994).

of the United States and Louisiana Constitutions.⁵⁸ However, the Supreme Court reversed the Fourth Circuit.⁵⁹ Justice Johnson wrote for the Court,⁶⁰ finding that manslaughter and feticide were “aimed at different evils”⁶¹ and that the Legislature intended that a perpetrator be penalized separately for killing an unborn child where the mother is also killed.⁶²

Another issue raised by the semantics of Louisiana’s statutory scheme was whether the murder of an unborn child could be considered the murder of a “person” for purposes of the statute that provides that a first degree murder is the killing of a human being when the offender has a specific intent to kill or inflict great bodily harm upon *more than one person*. In *State v. Keller*,⁶³ the defendant killed a pregnant woman and her unborn child while knowing she was pregnant. The First Circuit held that although a fetus is not a human being for purposes of the homicide statutes,⁶⁴ it is a “person.”⁶⁵ Thus, if someone kills a human being, i.e. one born alive, while possessing the specific intent to kill or to inflict great bodily harm upon two persons, such conduct constitutes first degree murder regardless of whether or not the other person was a human being born alive or was a fetus.⁶⁶ The Court denied writs in this case.

⁵⁸ 647 So. 2d at 1327; *see also* *State v. Powell*, 671 So. 2d 493 (La. Ct. App. 1995) (Judge Kuhn followed the Fourth Circuit and found that the double jeopardy clause applied when a defendant kills both the mother and the fetus. He did express his displeasure with such an outcome, however: “Courts are often called upon to adhere to constitutional principles which must be honored to clearly and impartially apply the law. This is true regardless of how offensive a defendant’s conduct may appear when viewed from a moral perspective.”)

⁵⁹ *See State v. Smith*, 676 So. 2d 1068 (La. 1996).

⁶⁰ Justice Calogero concurred in denial of rehearing writing separately to say that the double jeopardy clause barred two separate *trials* for these two offenses since Second Degree Feticide was based on the manslaughter of the mother but that convictions and sentencing for both *in the same trial* were approved under *Whalen v. United States*, 445 U.S. 684 (1980). Justices Kimball and Victory were on the panel that issued the majority opinion.

⁶¹ 676 So. 2d at 1072.

⁶² Arguably, the Court was following the rule set forth in Justice Calogero’s concurrence that the defendant could be penalized for both crimes only if they were tried in the same proceeding but the majority opinion is not clear on that issue.

⁶³ 592 So. 2d 1365 (La. Ct. App. 1992), *writs den.*, 594 So. 2d 878 (La. 1992).

⁶⁴ The First Circuit said, “Although tragic, the death of the unborn child, or fetus, is not the issue in this case.” *Id.*

⁶⁵ *Id.* at 1366 (Since LA. REV. STAT. § 14:2(7) as amended in 1976 provides that for purposes of the criminal statutes of Louisiana, “person” includes a human being from the moment of fertilization and implantation.)

⁶⁶ *Id.*

Long before abortion, stem cell research, or cloning had even been a thought in the minds of the scientific community, the rights of the unborn to inherit⁶⁷ and recover for damages were being discussed – and thus the question of when life begins. Long before any other state, Louisiana law – grounded in the civil law, most often the French Napoleonic Code - recognized that, from the point of conception, an unborn child possessed certain rights maintained if later born alive.⁶⁸ Article 29 of the Louisiana Civil Code, enacted in 1825, provided that children in a mother's womb were considered, in whatever related to themselves, as if they were already born.⁶⁹ The Louisiana courts and Louisiana Legislature, as many other courts and Legislatures, have from time to time grappled with whether it makes a difference if a child is born alive or not and whether an unborn child's rights differ depending on whether they were inheritance rights, property rights, or personal rights.⁷⁰

Although the law has not always been clear,⁷¹ since 1923, Louisiana courts have recognized that parents have an action for the wrongful death of a child even if that child is not born alive.⁷² In dicta in *Cooper v. Blanck*,⁷³ an Orleans Circuit Court found it was manifest that

⁶⁷ See, e.g., *Lewis v. Hare*, 8 La. Ann. 378 (La. 1853) (infant born after death of father inherits his personal injury claim); *Badie v. Columbia Brewing Co.*, 77 So. 768 (La. 1918) (a right of action survives to a child *en ventre sa mere* and said child can recover after its birth for the loss of its father, killed by the wrongful act of another); *Tyler v. Lewis*, 78 So. 477 (La. 1918) (grandchild born 6 months after grandfather's death was conceived at time of death and, therefore, inherits); *Succession of Carbajal*, 98 So. 666 (La. 1924) (unborn child provided for in will but born after father's death inherits under will); *Winsberg v. Winsberg*, 56 So. 2d 730 (La. 1952) (U.S. Savings Bond is donation mortis causa and goes to child born after father's death rather than beneficiary of bond).

⁶⁸ See, e.g., *Lewis*, 8 La. Ann. 378; *Badie* 142 La. 853; See also LA. CIV. CODE art. 954 (1970) (repealed) ("The child in its mother's womb is considered as born for all purposes of its own interest; it takes all successions opened in its favor since its conception, provided it be capable of succeeding at the moment of its birth"); LA. CIV. CODE art. 956 (1870) (repealed) ("When the child is born alive, though it may have been extracted by force from its mother's womb, and may have lived but an instant, . . . it inherits the successions opened in its favor since its conception."); LA. CIV. CODE art. 1482 (1870) (repealed) ("In order to be capable of receiving by donation inter vivos, it suffices to be conceived at the time of the donation.").

⁶⁹ See LA. CIV. CODE ANN. art. 26 (2007) cmt. (1987(b)). The term "children in the mother's womb" was changed to "an unborn child" in 1987. An "unborn child" may be a person even if it is in a test tube (rather than its mother's womb). In the Code of 1808 it was a bit different.

⁷⁰ See, e.g., *Cooper v. Blanck*, 39 So. 2d 352 (La. Ct. App. 1923).

⁷¹ See, for example, intermediate court decisions such as *Youman v. McConnell*, 7 La. App. 315 (La. Ct. App. 1927) and *Wascom v. Am. Indem. Corp.*, 348 So. 2d 128 (La. Ct. App. 1977), *cert. denied* 350 So. 2d 1224 (action for loss of twin fetuses stillborn), both of which held that parents have no cause of action to recover damages for the wrongful death of a child born dead.

⁷² See *Johnson v. South N. O. Light & Traction Co.*, (No. 9,048) (La. Ct. App. Orl. Cir. 1923) (The refusal of writs also went unreported (No. 26443) (La. 1924)); see also *Valence v. Louisiana Power & Light Co.*, 50 So. 2d 847 (La.

injury to a child “*en ventre sa mere*” was an injury to a *living* child and that if the child was killed at this period, before its birth, there was no reason why its parents could not maintain an action for the death of their child.⁷⁴

In 1982, in *Danos v. St. Pierre*,⁷⁵ a six-month-old unborn child was born dead because of placental separation caused by an automobile accident. The parents sued the person driving the car that hit them for wrongful death of “[their] unborn baby girl.”⁷⁶ The Louisiana Supreme Court (“Court”) found that “the loss to the parents of a child who otherwise would have been born normally is substantially the same, whether the tortfeasor’s fault causes the child to be born dead or to die shortly after being born alive, and a cause of action for the loss should be recognized in either event. . . .”⁷⁷ Perhaps most telling, the Court rejected the argument that an unborn child is part of the mother’s anatomy.⁷⁸ It said,

[t]he argument of the defendant is that the infant before it is born is not a child, not a human being, that it is only a thing, a part of the anatomy of the mother, as are her organs. We cannot accept that theory. We believe the infant is a child from the moment of its conception, although life may be in a state of suspended animation, the subject of love, affection, and hope and that the injury or killing of it, in its mother’s womb, is covered by the statute of 1884 and gives the bereaved parents a right of action against the guilty parties for their grief, and mental anguish.⁷⁹

The *Danos* Court also recognized the right of a child born alive to recover from a tortfeasor for injuries received while in the womb.⁸⁰ Unfortunately, however, a child who dies *in*

Ct. App. 1951) (negligent operation of bus where mother was injured and child stillborn); *Cooper v. Blanck*, 39 So. 2d 352 (La. Ct. App. 1923) (published in 1949); *Heins v. Guzman* (No. 9484) (La. Ct. App. Or. Cir. 1924). *See also* Note, *Torts: Prenatal Injuries: Louisiana Law*, 12 LA. L. REV. 519 (1952).

⁷³ 39 So. 2d 352 (La. Ct. App. 1923) (published in 1949) (Parents sued landlord for negligent maintenance of premises causing death of child when plaster fell from ceiling onto pregnant mother; child delivered prematurely but lived three days.).

⁷⁴ *Id.* at 360.

⁷⁵ 402 So. 2d 633 (La. 1981) (on rehearing). *See also* *Bailey v. Khoury*, 891 So. 2d 1268 (La. 2005).

⁷⁶ *Danos v. St. Pierre*, 402 So. 2d at 637.

⁷⁷ *Id.* at 638.

⁷⁸ 530 So. 2d at 639 (quoting *Johnson v. South N. O. Lt. & Traction Co.*, No. 9,048 (La. Ct. App. Or. Cir. 1923)).

⁷⁹ *Id.*

⁸⁰ *Id.*; *see also* *Bailey*, 891 So. 2d 1268.

utero cannot recover for pain and suffering *in utero*. Only a child born alive has such a cause of action.⁸¹ In *Wartelle v. Women and Children's Hospital*,⁸² a baby died during labor at a time when the fetal heart monitor had been negligently removed by hospital staff. Although allowing recovery for the child's wrongful death by the parents, the Court engaged in a detailed application of statutory interpretation to arrive at the conclusion that, under Louisiana law, a child not born alive "loses" his/her personhood and, therefore, cannot recover for pain and suffering.⁸³ The Court does state, however,

The Louisiana Civil Code's refusal to accord unconditional legal personality to a fetus before live birth constitutes no moral or philosophical judgment on the value of the fetus, nor any comment on its essential humanity. Rather, the classification of 'person' is made solely for the purpose of facilitating determinations about the attachment of legal rights and duties.⁸⁴

*Cox v. Gaylord Container Corporation*⁸⁵ is an intermediate court case of interest in this area, because one of the judges who authored an opinion in it is rumored to be running for Chief Justice Calogero's position in 2008. In *Cox*, a pregnant woman negligently drove a forklift into a steel I-beam, injuring herself and, allegedly, her unborn child. She sued her employer on behalf of her child, alleging the employer was vicariously liable to the child for the mother's negligence.⁸⁶ Although the First Circuit ultimately ruled that the issue of whether the unborn child had a right to sue her mother was not properly raised,⁸⁷ Judge James E. Kuhn⁸⁸ was against allowing such an action because of a mother and child's "symbiotic relationship."⁸⁹

⁸¹ *Wartelle v. Women's and Children's Hosp., Inc.*, 704 So. 2d 778 (La. 1997).

⁸² *Id.*

⁸³ *Id.* at 781-83; *see also* LA. CIV. CODE ANN. art. 25 ("Natural personality commences from the moment of live birth and terminates at death."); LA. CIV. CODE ANN. art. 26 ("If the child is born dead, it shall be considered never to have existed as a person . . ."). Eight of the nine current justices on the Supreme Court joined the majority opinion. Justice Knoll had to recuse herself because she had been on the lower appellate court which had ruled in favor of a survival action on behalf of an unborn fetus. Later, in *Bailey v. Khoury*, Justice Knoll strongly stated her opinion that *Wartelle* had been wrongly decided. 891 So. 2d 1258, 1287-89 (Knoll, J., concurring).

⁸⁴ *Wartelle*, 704 So. 2d at 777.

⁸⁵ 897 So. 2d 1 (La. Ct. App. 2004) (Downing, J.), reh'g en banc, 897 So. 2d 1 (La. Ct. App. 2005), *writ denied*, 901 So. 2d 1102 (La. 2005).

⁸⁶ *Id.* at 4.

⁸⁷ 897 So. 2d 1, 6 (La. Ct. App. 2005) (reh'g en banc),

Since *Cox* was decided, Louisiana has included prenatal neglect in the definition of neglect of a child⁹⁰ and required reporting of same to child protection services.⁹¹ Arguably, the legislative recognition of prenatal neglect would change the holding of this case.

Most recently, in a case of apparent first impression,⁹² Chief Justice Calogero wrote for a unanimous court in *Bailey v. Khoury*.⁹³ In *Bailey*, the mother was prescribed Depakote, a psychotropic drug, prior to conception but was never told it caused birth defects. She conceived while taking the drug, and the baby was born severely deformed, something that was learned two months into the pregnancy. The parties and the Court recognized that the baby had a cause of action for damage sustained *in utero*, but the defendant argued that the time within which to bring such a cause of action began at the moment of *discovery* of the condition, i.e. while the baby was still *in utero*.⁹⁴ A strict construction of the law relating to statutes of limitation should have, arguably, resulted in such being the case. However, the Court concluded the statute that gave the child a cause of action was “clearly enacted to *protect* unborn children and not to disadvantage them.” The Court held that, although the child had been “considered a natural person from the moment of her conception and was able to acquire a cause of action while she was *in utero*, she would not be able to pursue this action until she was born. Logic, therefore,

⁸⁸ Judge Kuhn is located in the Supreme Court district which will be holding an election in 2008 to fill Justice Calogero’s seat.

⁸⁹ 897 So. 2d at 9 (Kuhn, J., concurring) (“[T]here is nothing in our statutes or case law that addresses the right of a child to maintain a cause of action against his or her mother for negligent infliction of prenatal injuries. To permit such a legal remedy would overlook the unique symbiotic relationship between the mother and her unborn child and would create a myriad of problems.”)

⁹⁰ LA. CHILDREN’S CODE art. 603(14), (16.1) (West 2007). Prenatal neglect includes the taking of illegal drugs and/or alcohol during pregnancy to such a degree that the child is born in withdrawal or with the substance in his system.

⁹¹ See LA. CHILDREN’S CODE art. 610(G) (West 2007) (requiring physicians to report incidents of prenatal neglect to child protection services.)

⁹² *Bailey v. Khoury*, 891 So. 2d 1268 (La. 2005) (“[O]ur research indicates that the issue presented may be one of first impression, not only in the State of Louisiana, but in every legal jurisdiction in the United States. . . . Rapid advances in many scientific disciplines have led to the application of new methods and technologies in every aspect of medicine. Often these new capabilities require fundamental changes in legal analysis or raise legal questions that never before have required consideration.”)

⁹³ *Id.*

⁹⁴ *Id.* at 1270-71.

dictate[d] that any cause of action that may be brought on her behalf for injuries she suffered *in utero* would not prescribe until one year from the date of her birth.”⁹⁵

In 1997, Louisiana enacted a tort statute for the act of providing an abortion.⁹⁶ The “Liability for Termination of a Pregnancy”⁹⁷ statute provides that any person who performs an abortion⁹⁸ is liable to the mother of the unborn child⁹⁹ for any damage to the mother or the child¹⁰⁰ occasioned or precipitated by the abortion.¹⁰¹

Almost immediately, one doctor and five health care clinics¹⁰² sued the Governor and Attorney General of Louisiana to enjoin the enforcement of the statute, claiming it was an undue burden on a woman’s right to obtain an abortion and, therefore, unconstitutional under *Planned Parenthood v. Casey*.¹⁰³ The federal district court found the statute was unconstitutional and enjoined its enforcement.¹⁰⁴ The Governor and Attorney General appealed to the Fifth Circuit. Although initially upholding the trial court,¹⁰⁵ the Fifth Circuit, *en banc*, held, that the plaintiffs had no case or controversy with the Governor and Attorney General and that it lacks Article III jurisdiction to decide this case.¹⁰⁶

⁹⁵ *Id.* at 1278 (quoting *Bailey v. Koury* 868 So. 2d 821, 823 (2004)).

⁹⁶ LA. REV. STAT. § 9:2800.12 (West 2007). In 2007, Louisiana enacted LA. REV. STAT. § 40:1299.35.17 (West 2007) which provides a civil tort action against a physician performing a partial birth abortion.

⁹⁷ This statute is commonly referred to as “Act 825.”

⁹⁸ “‘Abortion’ means the deliberate termination of an intrauterine human pregnancy after fertilization of a female ovum by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead unborn child.” LA. REV. STAT. § 9:2800.12(B)(1) (West 2007).

⁹⁹ “‘Unborn child’ means the unborn offspring of human beings from the moment of conception through pregnancy and until termination of the pregnancy.” *Id.* § 9:2800.12(B)(3).

¹⁰⁰ The term “[d]amage” includes all special and general damages which are recoverable in an intentional tort, negligence, survival, or wrongful death action for injuries suffered or damages occasioned by the unborn child or mother.” *Id.* § 9:2800.12(B)(2).

¹⁰¹ *Id.*

¹⁰² Plaintiffs included other physicians, individuals, and businesses who perform abortions in the State of Louisiana. Plaintiffs provide over eighty percent of the abortion services rendered in Louisiana. No patients of the doctors appeared in the lawsuit. *See Okpalobi v. Foster*, 244 F.3d 405, 410 n.4 (5th Cir. 2001).

¹⁰³ 505 U.S. 833 (1992). The plaintiffs further claimed that the Act would force physicians in Louisiana to cease providing abortion services to women because of the potential exposure to civil damage claims authorized by the Act and that, if they were forced to discontinue providing their services, the State would achieve what it could not constitutionally do otherwise--eliminate abortions in Louisiana.

¹⁰⁴ *See Okpalobi v. Foster*, 981 F. Supp. 977 (E.D. La. 1998).

¹⁰⁵ *Okpalobi v. Foster*, 190 F.3d 337 (5th Cir. 1999).

¹⁰⁶ *Okpalobi v. Foster*, 244 F.3d 405, 409 (5th Cir. 2001) (quoting *Smythe v. Ames*, 169 U.S. 466, 529-30(1898) (“In the present case, as we have said, neither of the state officers named held any *special relation* to the particular

Not surprisingly, the abortion industry, including most of the plaintiffs in the *Okpalobi* suit,¹⁰⁷ filed suit in state court on the very same basis as the federal suit. In *Women's Health Clinic v. State*,¹⁰⁸ the trial court found the abortion tort statute unconstitutional under *Roe*.¹⁰⁹ The State appealed the district court's judgment to the Court. Faced with an opportunity to declare the statute unconstitutional, the Court instead concluded that the issue of the constitutionality of the statute was not ripe for determination, vacated the portion of the district court's judgment declaring the Act unconstitutional, and transferred the case to an intermediate appellate court for expedited review of the judgment granting the preliminary injunction.¹¹⁰ The First Circuit reviewed the Fifth Circuit's *en banc* decision in *Okpalobi* and found it to be on point and highly persuasive and instructive. It, too, found no justiciable controversy between abortion providers and the state, as the statute created a *private* right of action in favor of women who suffer damage while undergoing an abortion and contained no provision authorizing the state or any of its agencies or officers to enforce, or take any action on, the provision of the statute.¹¹¹ The Court upheld that decision¹¹² and it does not appear that the abortion industry has pursued this any further.¹¹³

The Court has even recognized that *before* conception, a physician owes a duty to the

statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. . . ."). By refusing jurisdiction the court affirmed that "the power granted to federal courts under Article III 'is not an unconditioned authority to determine the constitutionality of legislative or executive acts.'" *Id.* at 425 (citing *Valley Forge Christian College v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982)). Furthermore, the Court found that the Governor and Attorney General enjoyed immunity from suit in federal court pursuant to the Eleventh Amendment. *Id.* at 424. It noted, though, that the Eleventh Amendment was not a bar to the USSC's consideration of a case against state officers brought to it by way of state courts. *Id.* at 429 n.40 (citing *South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 166 (1999)). *Cf.* *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604 (E.D. La. 1999), *aff'd*, 221 F.3d 811 (5th Cir. 2000) (holding criminal partial birth abortion statute unconstitutional).

¹⁰⁷ See *Women's Health Clinic v. State*, 825 So. 2d 1208, 1210 (La. Ct. App. 2002).

¹⁰⁸ 825 So. 2d 1208 (La. App. 1st Cir. 2002) *writs denied per curium*, 828 So. 2d 586 (La. 2002) (Note: all current justices except Weimer sat on this court).

¹⁰⁹ *Id.* at 1209-10.

¹¹⁰ See *Women's Health Clinic v. State*, 804 So. 2d 625, 626 (La. 2001)

¹¹¹ *Id.* at 1210-11.

¹¹² 828 So. 2d 586 (La. 2002) (Note: all current justices except Weimer sat on this court).

¹¹³ *But see* *LW v. Delta Clinic of Baton Rouge, Inc.*, No. 2006 CA 0134, 2007 WL 866478 (La. Ct. App. 2007) (For purpose of this statute, abortion does not include the removal of an already dead fetus. Death of fetus was a disputed factual issue which could not be determined on summary judgment. However, cause of action appeared to be alive and well in Louisiana.).

child to avoid reasonably foreseeable harm.¹¹⁴ In the interesting “wrongful life” case of *Pitre v. Opelousas General Hospital*,¹¹⁵ a suit was brought by the parents of a child born with albinism after the mother had a tubal ligation. The Court found that “[w]hen a physician knows or should know of the existence of an unreasonable risk that a child will be born with a birth defect, he owes a duty to the unconceived child as well as to its parents to exercise reasonable care in warning the potential parents and in assisting them to avoid the conception of the deformed child.”¹¹⁶ And, although the cause of action existed and although the parents could recover for their expenses incurred during pregnancy and delivery and for their emotional and mental distress, among other things,¹¹⁷ they were not allowed to recover for the economic costs of rearing an unplanned and unwanted child, the expenses of the change in family status, or other things related to adding a child to the family. As the Court said, “[t]hese are the ordinary vicissitudes that befall any family with the birth of a healthy, normal child. Absent unusual circumstances, a child is presumed to be a blessing not offset by the inconvenience of redistributing the family income and patrimony which he or she may occasion.”¹¹⁸

Assisted Suicide

When it comes to life support issues in Louisiana, it is important to make a distinction between euthanasia and antidythanasia. Euthanasia is defined as the act or practice of painlessly putting to death persons suffering from incurable conditions or diseases”¹¹⁹ and involves the *active* hastening of one’s death by the *act* or assistance of another.¹²⁰ The Louisiana Constitution protects the citizens of Louisiana from euthanasia.¹²¹ “Antidythanasia,” on the

¹¹⁴ See *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151 (La. 1988).

¹¹⁵ *Id.* (majority opinion written by Justice James Dennis, now on the 5th U.S. Circuit Court of Appeals; concurrence by Justice Calogero).

¹¹⁶ *Id.* at 1157 (Court found a duty “to avoid foreseeable harm to present or future generations.”). “Logic and sound policy require a recognition of a legal duty to a child not yet conceived but foreseeably harmed . . .” *Id.* at 1157; “[T]he duty of care, the breach of which will create liability, should not depend on the physical existence of the individual plaintiff at the moment of the defendant’s wrongful act . . .” *Id.* at 1158.

¹¹⁷ *Id.* at 1161-62.

¹¹⁸ *Id.* at 1162.

¹¹⁹ See *In re P.V.W.*, 424 So. 2d 1015, 1022 n.13 (La. 1982).

¹²⁰ See Comment, *The Right to Die*, 7 HOUS. L. REV. 654, 654 (1970). See also Vitiello, *Louisiana’s Natural Death Act and Dilemmas in Medical Ethics*, 46 LA. L. REV. 259, 269 n.87 (1985).

¹²¹ See LA. CONST. art. I, § 20 (“No law shall subject any person to euthanasia . . .”).

other hand, is the *passive* hastening of one's death by refusing medical treatment.¹²² Louisiana law condones strict antidysthanasia. Removing medical "treatment," which actually hastens death by an *act* of another as opposed to the passive refusal of treatment, poses problems in Louisiana as it does in most states.

The Louisiana Legislature has determined that "all persons have the fundamental right to control the decisions relating to their own medical care, including the decision to have life-sustaining procedures withheld or withdrawn."¹²³ The first statutory provision relating to removing life support, the Preserving the Life of Children Act (PLCA),¹²⁴ was enacted in 1982 and was interpreted by the Court that same year.¹²⁵ In the case of *In re P.V.W.*,¹²⁶ the Court allowed withdrawal of life support from a newborn infant whose brain was severely and irreversibly damaged at birth and who had been in a comatose state ever since with life sustained only by a mechanical ventilator.¹²⁷ The Court found that a permanently comatose child had an independent statutory right to discontinue artificially sustained life through the mechanical invasion of its body and that an appropriate representative of the child could judicially assert that right on behalf of the child¹²⁸ - an agency theory, of sorts. However, the Court also noted that

¹²² Parker, *The Withholding or Withdrawal of Life-Sustaining Medical Treatment Under Louisiana Law*, 45 LOY. L. REV. 121, 169 n.6 (1999). See also Cannon, *infra* n. 203.

¹²³ See LA. REV. STAT. § 40:1299.58.1 (West 2007)

¹²⁴ Preserving the Life of Children Act, LA. REV. STAT. § 40:1299.36.1-.3(1982) (repealed by 1991 La. Acts 235, § 17 (1991)). See generally LA. CHILDREN'S CODE arts. 1553-1555, 1559-1563; *In re P.V.W.*, 424 So. 2d 1015, 1019 (La.1982) ("The purpose of Act 339 of 1982 was to provide with respect to nutritional and medical deprivation of an infant with the intent to cause or allow death, to provide for procedures when parental consent for necessary care and treatment is refused, and to provide with respect to judicial proceedings to enforce the provisions of the act."). The statutory provisions prohibited denial or deprivation of food, water, or oxygen or any medical or surgical care necessary to save the life of an infant *for any reason* even when the quality of the child's life would be deficient if the child lived. LA. REV. STAT. § 40:1299.36.1(A)-(B) (1982) (repealed 1991). Nevertheless, an exception allowed the child's parents and physicians to discontinue use of life support systems and other medical treatment for a child in a continual profound comatose state where, in the opinion of the child's physician, the child had no reasonable chance of recovery despite every appropriate medical treatment being used. LA. REV. STAT. § 40:1299.36.1(C)(1982) (repealed 1991).

¹²⁵ *In re P.V.W.*, 424 So. 2d 1015 (La. 1983).

¹²⁶ *Id.* (The baby's parents brought an action in juvenile court for a declaratory judgment, seeking judicial approval of discontinuation of life support systems. The juvenile court had dismissed the action finding that it had no jurisdiction over the issue. The parents appealed.)

¹²⁷ *Id.* at 1017 n.4.

¹²⁸ *Id.* at 1020 (The procedures by which a parent could get judicial authorization and the jurisdiction of the juvenile courts were also issues in this case.)

the asserted interest of the child – death – was adverse to the state's interest in preserving life.¹²⁹ Was removal of the ventilator an act of euthanasia and violative of the Louisiana Constitution?¹³⁰ Noting modern medical science, the Court found that there was a vast difference between a person whose quality of life had been significantly decreased and a person whose body had been invaded by machines which could not cure or improve but only artificially prolong an existence that would never be known by the patient.¹³¹ In a poorly reasoned decision based more on the law of other states than on Louisiana law, it held that preserving a person's existence in an irreversible vegetative coma by such machines had little to do with the continuation or the ending of life so that removal of such systems could not be violative of the constitutional prohibition against euthanasia.¹³²

The Natural Death Act was enacted in 1984 and provides a process by which a person with a terminal and irreversible condition,¹³³ or another enumerated interested party,¹³⁴ may choose to have “life-sustaining procedures”¹³⁵ removed.¹³⁶ In 1991,¹³⁷ the Legislature amended

¹²⁹ *Id.*

¹³⁰ LA. CONST. art. I, § 20.

¹³¹ 424 So. 2d at 1022.

¹³² *Id.*

¹³³ “‘Terminal and irreversible condition’ means a continual profound comatose state with no reasonable chance of recovery or a condition caused by injury, disease, or illness which, within reasonable medical judgment, would produce death and for which the application of life-sustaining procedures would serve only to postpone the moment of death.” LA. REV. STAT. § 40:1299.58.2(15) (West 2007). *See also* Parker, *supra* note at 142-43.

¹³⁴ The following persons in the following order have that authority: the person designated in a living will, judicially appointed curator/guardian, spouse, adult child, parents, siblings, other ascendants/descendants. *See* LA. REV. STAT. ANN. § 40:1299.58.5(2) (West 2007).

¹³⁵ “‘Life-sustaining procedure’ means any medical procedure or intervention which, within reasonable medical judgment, would serve only to prolong the dying process for a person diagnosed as having a terminal and irreversible condition, including such procedures as the invasive administration of nutrition and hydration and the administration of cardiopulmonary resuscitation. A ‘life-sustaining procedure’ shall not include any measure deemed necessary to provide comfort care.” LA. REV. STAT. ANN. § 40:1299.58.2(9) (West 2007).

¹³⁶ As originally enacted, the NDA did not include the administration of medication or the performance of any medical procedure deemed necessary to provide comfort care in the definition of a “life-sustaining procedure” and did not allow removal of life support from a person who was in an irreversible condition that was not terminal. *See* LA. REV. STAT. ANN. § 40:1299.58.2 cmt. *See also* Vitiello, *Louisiana's Natural Death Act and Dilemma in Medical Ethics*, 46 LA. L. REV. 259, 295 (1985).

¹³⁷ And again in 1998.

the definition of "life-sustaining procedure" to include the invasive administration of nutrition and hydration.¹³⁸

The one and only time the Louisiana's courts have considered application of the Natural Death Act was in *Pettis v. Smith*.¹³⁹ In *Pettis*, a daughter sought to enjoin her brother and sister from implementing the "living will" of their 89 year old mother which authorized withdrawal of life-sustaining medical procedures but continuance of "comfort care." Both of her doctors testified that by feeding her intravenously, she could be kept alive for a year or two; however, if the tube were withdrawn, she would live only "a few days, to a week." Ms. Pettis argued that nutrition and hydration were comfort care¹⁴⁰ and that her mother could not and would not have consented to such procedure if she had known she would, in effect, starve to death.¹⁴¹ The Second Circuit refused to accept such an argument¹⁴² and, in effect, ordered that the gastric tube be removed. The Louisiana Supreme Court denied writs.¹⁴³

In 1991, in response to *Cruzan v. Missouri Dept. of Health*,¹⁴⁴ the PLCA was repealed and the Protection of Terminally Ill Children Act (PTICA)¹⁴⁵ was added to the Children's Code to provide a single set of guidelines for parents, physicians, and hospital personnel.¹⁴⁶

¹³⁸ See LA. REV. STAT. ANN. § 40:1299.58.2 cmt. See also *Pettis v. Smith*, 880 So. 2d 145 (La. Ct. App. 2004), writ denied, stay denied, 882 So. 2d 551 (La. 2004).

¹³⁹ 880 So. 2d 145 (La. Ct. App. 2004). In *Causey v. St. Francis Medical Center*, 719 So. 2d 1072 (La. Ct. App. 1998), the court cited the Act in dicta for the proposition that a court, "as the protector of incompetents," can override an intolerable choice to refuse medical care for terminally ill incompetent patient made by a surrogate decision-maker. See 719 So. 2d at 1074.

¹⁴⁰ To this day, no statute or judicial decision defines the term "comfort care."

¹⁴¹ 880 So. 2d at 152. Note, however, that there was testimony by her son that she had specifically told him she did not want a feeding tube.

¹⁴² *Id.*

¹⁴³ 882 So. 2d 551 (La. 2004).

¹⁴⁴ 497 U.S. 261 (1990).

¹⁴⁵ See LA. CHILDREN'S CODE art. 1551-1563 (2007).

¹⁴⁶ See LA. CHILDREN'S CODE art. 1551 cmt. (2007). Under the PTICA, a spouse, parent, or guardian of a child has the right to make a declaration pursuant to which life-sustaining procedures or other medical care may be withheld or withdrawn from certain terminally ill children. If a child's parents or physician cannot agree, one of them may petition the juvenile courts for judicial review of such decisions. This hearing is confidential and held in chambers. If a parent wrongfully refuses treatment, the physician can file a Child In Need of Care petition in the juvenile courts to have the child removed from the parent's custody. If a parent does not want medical treatment continued, he may surrender custody of the child and place him with the state or an adoption agency at which time the state or agency is responsible for continuing treatment.

Additionally, the NDA ¹⁴⁷ covers children, as well as adults, creating a somewhat conflicting situation. While the NDA would allow for withdrawal of life-sustaining procedures, specifically defined to include the invasive administration of nutrition and hydration,¹⁴⁸ the PTICA specifically provides that comfort care, including food, nutrients, water, and oxygen cannot be taken from a child.¹⁴⁹ There has been no judicial decision interpreting the provision of the PTICA or the NDA as it pertains to children.

In Louisiana, "suicide" is defined as the intentional and deliberate act of taking one's own life through the performance of an act intended to result in death. Although suicide is not a crime, intentionally advising or encouraging another person to commit suicide or providing the physical means or the knowledge of such means to another person to enable them to commit or attempt to commit suicide is a crime.¹⁵⁰ However, this law specifically does not apply to a healthcare professional who withholds or withdraws medical treatment in accordance with law or who prescribes, dispenses, or administers any medication, treatment, or procedure with the intent to relieve the patient's pain or suffering and not to cause death.¹⁵¹ There have been no reported judicial decisions regarding assisted suicide.

Healthcare Rights of Conscience:

There are also statutes that provide governmental protection to those who do not perform or get abortions. No woman may be discriminated against for refusing to accept or

¹⁴⁷ LA. REV. STAT. ANN. § 40:1299.58.1-.10 (West 2007). LA. CHILDREN'S CODE art.1551 also provides that the procedures authorized by the Act are in addition to the existing remedies of Title VI, which is the Children In Need of Care provisions found at LA. CHILDREN'S CODE arts. 601-717.

¹⁴⁸ See LA. REV. STAT. ANN. § 40:1299.58.2(9) (West 2007) ("Life-sustaining procedure means any medical procedure or intervention which, within reasonable medical judgment, would serve only to prolong the dying process for a person diagnosed as having a terminal and irreversible condition, including such procedures as the invasive administration of nutrition and hydration and the administration of cardiopulmonary resuscitation. A 'life-sustaining procedure' shall not include any measure deemed necessary to provide comfort care.")

¹⁴⁹ See LA. CHILDREN'S CODE arts. 1553, 1552(6) (2007). Although the provisions of these two Acts conflict, the provisions of the PTICA should supersede those of the NDA as they apply to children for numerous reasons. First, the legislature enacted the PTICA and amended the NDA to include the invasive administration of nutrition and hydration as a life-sustaining procedure in the same session. Thus, legislative intent would indicate a purposeful distinction. Secondly, the NDA specifically provides that when interpreting it any ambiguity should be interpreted to *preserve* human life. See LA. REV. STAT. ANN. § 40:1299.58.10(E) (West 2007).

¹⁵⁰ See LA. REV. STAT. ANN. § 14:32.12 (West 2007). It is also a criminal act to advise, encourage, or assist another person to commit suicide or to participate in any physical act which causes, aids, abets or assists them in doing so.

¹⁵¹ *Id.*

submit to an abortion.¹⁵² No medical or health facility may be held liable or discriminated against because of any refusal to accommodate an abortion.¹⁵³ No physician, nurse, student or other person may be discriminated against because of his refusal to accommodate an abortion.¹⁵⁴ No employee in any social service agency may be discriminated against for refusal to take part in an abortion.¹⁵⁵ There are currently no statutes, however, protecting pharmacists for choosing not to issue contraceptives or abortifacients or protecting insurance carriers who choose not to cover abortions. There are no reported cases interpreting any right of conscience statute in Louisiana.¹⁵⁶

La. R.S. 40:1299.58.7 is the closest thing to a law protecting a physician's or an insurance company's rights of conscience regarding life support that Louisiana has. It provides that if a physician refuses to comply with a declaration, he must make a reasonable effort to transfer the patient to another physician.¹⁵⁷ In the same way, an insurance company who refuses coverage must make a reasonable effort to transfer the coverage to another company.¹⁵⁸ There are no reported decisions regarding a physician's or insurance company's refusal to abide by a life support directive.

Destructive Embryo Research

Of the several states that have legislated on the issue of embryonic stem cell research, Louisiana is by far the most unique and restrictive of the research. An *in vitro* fertilized human

¹⁵² LA. REV. STAT. § 40:1299.33 (West 1973).

¹⁵³ LA. REV. STAT. § 40:1299.32 (West 1973). *Cf.* Op. La. Att'y Gen. No. 75-835 (Mar. 4, 1976) (A public hospital should make its facilities available to staff physicians willing to perform elective non-medically necessary abortions; however, no physician or supporting personnel who have religious or moral convictions against abortion are required to participate in their performance.)

¹⁵⁴ LA. REV. STAT. § 40:1299.31 (West 1973).

¹⁵⁵ *Id.*

¹⁵⁶ As a side note, Louisiana is finally able to sell its "Choose Life" vanity license plates since, in *Henderson v. Stalder*, the Fifth Circuit Court of Appeals upheld their sale over a First Amendment viewpoint challenge that the state was not also providing a pro-choice plate. 407 F.3d 351 (5th Cir. 2005).

¹⁵⁷ *See* LA. REV. STAT. ANN. § 40:1299.58.7(B) (West 2007). Should a person willfully conceal, cancel, deface, obliterate, or damage a declaration, including the removal of a do-not-resuscitate identification bracelet, without the declarant's consent or who falsifies or forges a revocation of the declaration of another can be held civilly liable. *See id.* § 40:1299.58.9 (West 2007).

¹⁵⁸ *Id.* § 40:1299.58.7(D).

ovum over 36 hours of age is considered a juridical person, for purposes of Louisiana law,¹⁵⁹ a biological human being incapable of ownership,¹⁶⁰ and entitled to all the rights and protections bestowed upon a person by the law.¹⁶¹ A human ovum fertilized in vitro may be used solely for the support and contribution of the complete development of human in utero implantation.¹⁶² No embryo may be farmed or cultured solely for research purposes or any other purposes.¹⁶³ The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited.¹⁶⁴ There have been no reported judicial decisions in Louisiana relating to destructive embryo research or human experimentation.

Cloning

Louisiana had very strong anti-cloning laws on its book for years;¹⁶⁵ however, they expired in 2003 and, although vigorously debated every year since, have not been re-enacted. There have been no reported judicial decisions in the state of Louisiana relating to cloning.

The people of Louisiana have long evidenced a strong respect for life from its earliest form until death. They have given an embryo, nearly from the point of conception, the status of a juridical person endowed with all the civil rights of such a person. They have protected it from criminal violence, scientific experimentation and, but for the USSC, abortion. Due to its civil law tradition, the Louisiana Legislature – reflecting the will of the people - will always lead the charge on life issues in Louisiana. However, it can feel very confident that the elected Louisiana Supreme Court also has the same respect for life that the people of Louisiana have and will always uphold the laws that reflect the will of the people.

¹⁵⁹ LA. REV. STAT. ANN. § 9:123 (West 2007).

¹⁶⁰ *Id.* § 9:126, 130

¹⁶¹ *Id.* § 9:123, 125

¹⁶² *Id.* § 9:122.

¹⁶³ *Id.*

¹⁶⁴ *Id.* § 9:122.

¹⁶⁵ *Id.* § 40:1299.36-36.6

II. JUDICIAL RESTRAINT: *Jus Dicere, Non Jus Dare*¹⁶⁶

To truly understand the handling of life issues by the Louisiana Supreme Court, one must first understand the system of law in Louisiana. Unlike any other state in the union, Louisiana is a civil law jurisdiction, with inherent common law characteristics.¹⁶⁷ In civilian legal systems, legislation is the primary or authoritative source of law.¹⁶⁸ Jurisprudence is only a secondary or persuasive source of law.¹⁶⁹ The duty of civilian judges is simply to interpret and apply the law.¹⁷⁰

Since its inception, the Court has recognized that its role is to declare or expound upon the law and not to make it. As early as 1829, the Court recognized that even issues of hardship and the wisdom of a law were more properly addressed to the Legislature than to a court of justice.¹⁷¹ In many seemingly inequitable situations, the courts of this state have demonstrated judicial restraint and instructed the parties that, despite an inequity being worked upon them, their remedy was to change the law through the legislative process rather than through the courts.¹⁷²

¹⁶⁶ See FRANCIS BACON, *Of Judicature*, in *ESSAYS, CIVIL AND MORAL* (New York, P.F. Collier & Sons 1937) (1597). (“Judges ought to remember, that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law.”)

¹⁶⁷ Comment, *Louisiana's Class Action: Judge-Made Law in a Mixed Civil- And Common-Law Jurisdiction*, 61 TUL. L. REV. 1205, 1213 (1987) (citing Mack E. Barham, *A Renaissance of the Civilian Tradition in Louisiana*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND MIXED JURISDICTIONS* 38, 42, 66 (Joseph Dainow ed., 1974)). See also Albert Tate, *The Role of Judges in Mixed Jurisdictions: The Louisiana Experience*, in *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND MIXED JURISDICTIONS* 23 (Joseph Dainow ed., 1974).

¹⁶⁸ See Barham, *supra* note at 43.

¹⁶⁹ See Yiannopoulos, *supra* note 7, at 70.

¹⁷⁰ See Tate, *supra* note, at 24-25.

¹⁷¹ See *Martin v. Ashcraft*, 8 Mart. (n.s.) 313 (La. 1829) (involving imprisonment of judgment debtors).

¹⁷² See, e.g., *State v. Deslonde*, 27 La. Ann. 71 (La. 1875) (petition to judge to make the secretary of state promulgate a law that was allegedly passed) (“But courts have no power to promulgate laws and none of course to render order to others to promulgate them); *City of New Orleans v. O’Neil*, 10 So. 245, 246 (La. 1891) (regarding payment of certain taxes) (“If hardship results from grading licenses according to gross receipts, it is nevertheless the law, and relief must be sought from the legislature.”); *Sawyer v. Weber-King Mfg. Co.*, 193 So. 369 (La. 1940) (proceeding under Workman’s Compensation Act) (“it strikes us that these . . . matters . . . are some which address themselves to the wisdom or the policy of the law and not to its validity. . . . If . . . the employee feels that the law works a hardship on him, any relief must come from the Legislature and not from the courts . . .”); *State v. Lecompte*, 36 So. 2d 695, 698-99 (La. 1947) (criminal case where state did not prosecute within three years so case was dismissed) (“If the provision . . . is too drastic or unreasonable and works any hardship upon an accused person released on bond pending trial, the amendment or qualification of the law should be made by the Legislature and not

Recently, the Court has been faced with highly controversial and emotional issues involving same sex marriage,¹⁷³ sodomy,¹⁷⁴ and abortion rights.¹⁷⁵ In all three cases, the Court deferred to the wisdom and choice of the people through their legislative representatives or their vote. In 2000, Justice Traylor, writing for the court upholding the constitutionality of Louisiana's "crime against nature" statute perhaps most completely reflected the current court's position on judicial restraint:

The Louisiana Constitution is the highest law by which the government of this state was established. As such, our constitution is not to be subject to judicial amendment to express whatever a majority of this court happens to conclude at any given time is the more enlightened viewpoint on a particular controversial issue. If our constitution can be judicially amended in such a manner, that constitutes government by the court, rather than government through a constitutional system of which this court is a separate and equal branch. To hold otherwise would be to allow any and all disaffected groups unable to obtain legislative redress need only convince a majority of this court that what they seek is an implicit 'right' afforded by the Louisiana Constitution. Our constitution wisely provides for separation of powers, and authorizes the Legislature to make public policy determinations in this area.¹⁷⁶

by the Court, it being the duty of the Court to interpret the provision as written, and not as it should probably have been written."); *Hollingsworth v. City of Minden*, 828 So. 2d 514 (La. 2002) (Victory, J., and Weimer, J., dissenting) ("If the requirement of security for a suspensive appeal in annexation cases works a financial hardship on some parties, the remedy for this situation is with the legislature, not with the courts.").

¹⁷³ See *Forum for Equality PAC v. McKeithen*, 893 So. 2d 715 (La. 2005)

¹⁷⁴ See *State v. Smith*, 766 So. 2d 501 (2000); see also *Louisiana Electorate of Gays and Lesbians, Inc. v. State*, 812 So. 2d 626 (La. 2002) (per curiam). Justice Calogero is the only sitting justice who has dissented from the upholding of Louisiana's crime against nature statute being constitutional holding at various times that "few areas of personal autonomy are more private than sexual intimacy between consenting adults." See *State v. Baxley*, 633 So. 2d 142, 147 (La. 1994).

¹⁷⁵ See *Women's Health Clinic v. State*, 825 So. 2d 1208 (La. Ct. App. 2002), *writs denied per curiam*, 828 So. 2d 586 (La. 2002).

¹⁷⁶ *Smith*, 766 So. 2d at 510; see also *McKeithen*, 893 So. 2d at 723 (Knoll, J.).

In recent years, the USSC has looked to a variety of sources, including foreign law, to determine what the “evolving standards of decency” are.¹⁷⁷ Not so Louisiana. As evidence of society’s attitudes, the Court looks to the judgment of the state legislators, whom it considers to be the representatives of society.¹⁷⁸ For example, in *State v. Wilson*,¹⁷⁹ while holding that the death penalty for a person who rapes a child is constitutional, the Court stated, “In a democratic society Legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people. The courts must exercise caution in asserting their views over those of the people as announced through their elected representatives.”¹⁸⁰

The Court also has had no problem with being first or standing alone. For example, in the *Wilson* decision above, the Court was unconcerned with what other states were doing.

Justice Bleich stated,

The fact that Louisiana is the sole state allowing the death penalty for the rape of a child is not conclusive. There is no constitutional infirmity in a state’s statute simply because that jurisdiction chose to be first....If no state could pass a law without other states passing the same or similar law, new laws could never be passed. To make this the controlling factor leads only to absurd results.¹⁸¹

And what of the fact that Louisiana’s judiciary is elected? Must the judges respond to the people who elected them? Chief Justice Calogero, in his bi-annual State of the Judiciary address to the Legislature, has said,

Although a judge in our state may be elected, his or her allegiance is owed to the Louisiana Constitution and to the rule of law, not to the rule of the majority. It is the duty and the responsibility of each judge in this state to apply the constitution and laws to the facts before him or her, without fear or favor. A judge cannot be partisan, despite which way political winds may be blowing. An independent

¹⁷⁷ See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005) (execution of juveniles); *Atkins v. Virginia*, 536 U.S. 304 (2002) (execution of mentally retarded). In both cases the Supreme Court used its own judgment and looked to laws of other countries as well as the United Nations.

¹⁷⁸ See, e.g., *State v. Wilson*, 685 So. 2d 1063, 1067 (La. 1996).

¹⁷⁹ 685 So. 2d 1063 (La. 1996) (Kimball and Victory filed concurring opinions; Calogero filed a dissenting opinion).

¹⁸⁰ 685 So. 2d at 1067.

¹⁸¹ 685 So. 2d at 1069, 1073.

judiciary is a hallmark of our democracy, and we should take whatever steps are necessary to respect and preserve this independence.¹⁸²

Sometimes, however, the Court and the Legislature do a bit of a dance. The Court is not averse to “firing a shot across the bow,” so to speak, if it feels a law is inadequate or should be changed. For example, in *State v. Peart*,¹⁸³ Justice Calogero basically told the Legislature that if it did not reform the indigent defense system, the Court, “in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.”¹⁸⁴ In response to that shot, the Legislature created a statewide indigent defense board.¹⁸⁵

In this occasional dance with the state Legislature, however, the Court also recognizes its limits. In 2002, after the USSC decision in *Atkins v. Virginia*,¹⁸⁶ the Court had to fashion a procedure for determining who was mentally retarded, since Louisiana had no statute governing this issue. In *State v. Williams*,¹⁸⁷ Justice Weimer looked to other Louisiana statutes for direction, stating, “Until the Legislature acts, we feel constrained to follow this legislative directive.”¹⁸⁸ In 2003, the Legislature adopted a lengthy statute dealing with the procedure for determining competency, including the fact that the jury was to determine mental retardation.

¹⁸² Pascal F. Calogero, Jr., State of the Judiciary Address to the Joint Session of the House and Senate, Louisiana Legislature (May 3, 2005), at http://www.lasc.org/press_room/press_releases/2005/2005-07.asp.

¹⁸³ 621 So. 2d 780 (La. 1993) (Court established a presumption of incompetence for the understaffed and overworked public defenders in the courts of New Orleans).

¹⁸⁴ 621 So. 2d at 791 (“We decline at this time to undertake these more intrusive and specific measures because this Court should not lightly tread in the affairs of other branches of government and because the legislature ought to assess such measures in the first instance.”)

¹⁸⁵ Unfortunately, funding issues continue to plague the indigent defense system in Louisiana. Most recently, the Court fired another shot - a loud one - across the bow in the case of *State v. Citizen*, 898 So. 2d 325 (La. 2005). In *Citizen*, Justice Victory held, in effect, that the prosecution could not proceed in a capital case until the legislature adequately funded public defender offices. 898 So. 2d at 338-39. In 2006, the legislature doubled the budget of the statewide indigent defense board and, in 2007, enacted legislation completely overhauling the indigent defense system. See 2007 La. Acts 307.

¹⁸⁶ 536 U.S. 304 (2002).

¹⁸⁷ 831 So. 2d 835 (La. 2002) (Weimer, J.; Victory, J., concurring and dissenting on issue of determination by judge rather than jury).

¹⁸⁸ 831 So. 2d at 854 (The court also directed the lower courts that during the interim between its opinion and legislative action on the subject, mental retardation determinations should be handled just as competency hearings are handled, which included the judge determining mental retardation rather than the jury. *Id.* at 858)

Despite this legislative mandate, in 2005, a trial court determined that the statute was unconstitutional because it did not follow the Court's procedure set forth in *Williams*.¹⁸⁹ In response, the Court stated,

[t]he trial court erred in finding our jurisprudence is controlling over the Legislature's subsequent enactment of statutory procedures....We specifically noted we adopted those guidelines in the interim....Although in our view, the interests of judicial economy would be better served by the trial judge making a pretrial determination of whether the capital defendant is mentally retarded...we cannot say the Legislature's choice of permitting this issue to be submitted to the jury offends constitutional guarantees.¹⁹⁰

Each current justice has expressed his or her belief that he or she is constrained as a judge from creating new law.¹⁹¹

The current Court has repeatedly evidenced its understanding of its role within Louisiana's civil law system. Where the Legislature has spoken clearly on an issue – and the Legislature has spoken very clearly on life issues – the Court has a very small legitimate role to play. However, even if this were not the case, the current Court, reflecting the socially conservative nature of the citizens of Louisiana, would likely rule the same way on most life issues.

III. THE COURT

In the mid-1990s, with a Republican Governor newly elected in Louisiana, the Court experienced a shift in philosophy. Interested in a more conservative, restrained court, Governor

¹⁸⁹ See *State v. Turner*, 936 So. 2d 89, 92 (La. 2006).

¹⁹⁰ 936 So. 2d at 103 (La. 2006) (Knoll, J.; Calogero, Kimball, & Weimer, JJ., concurring; Johnson J., dissenting).

¹⁹¹ See, e.g., *Greater New Orleans Expressway Comm'n v. Olivier*, 892 So. 2d 570, 573 (2005) (Calogero, C.J.); *State v. Gyles*, 313 So. 2d 799, 802 (La. 1975); Pascal F. Calogero, Jr., *Advisory Opinions: A Wise Change for Louisiana and Its Judiciary?*, 38 LOY. L. REV. 329, 385 (1992); *Manuel v. State*, 692 So. 2d 320 (La. 1996) (on rehearing) (Kimball, J.); *Dow Hydrocarbons & Res. v. Kennedy*, 694 So. 2d 215, 219 (La. 1997) (Kimball, J.); *State v. Citizen*, 898 So. 2d 325, 334 (La. 2005) (Victory, J.); *Soloco, Inc. v. Dupree*, 707 So. 2d 12, 14-15 (La. 1998) (Knoll, J.); *State v. Smith*, 766 So.2d. 501 (La. 2000) (Traylor, J.); *Hoag v. State*, 889 So. 2d 1019, 1026 (La. 2004) (Traylor, J.); *Greater New Orleans Expressway Comm'n v. Olivier*, 892 So. 2d 570, 573 (La. 2005) (Johnson, J., dissenting); *Duplantis v. Louisiana Board of Ethics*, 782 So. 2d 582, 589 (La. 2001) (Johnson, J.); *State v. Smith*, 676 So. 2d 1068, 1070 (La. 1996) (Johnson, J.); *State v. Cunningham*, 903 So. 2d 1110, 1116 (La. 2005) (Weimer, J.); *In re Melancon*, 935 So. 2d 661, 666 (La. 2006) (Weimer, J.); *Ring v. Louisiana Dep't of Transp. and Dev.*, 835 So. 2d 423, 428 (La. 2003) (Weimer, J.).

Foster and a number of conservative business groups endorsed three candidates for the Court, helping them achieve victories and placement on the Court.¹⁹² Party affiliation does not necessarily reflect a person's political philosophy in Louisiana.¹⁹³ Today, although comprised of five Democrats and two Republicans, the Court would be considered a conservative court by most standards – certainly as to social issues.¹⁹⁴

The seven Court justices are elected from seven districts in Louisiana, with one justice elected from each of the districts. The judges are elected to 10-year terms, unless a judge is elected to serve out the term of another judge, in which case he is only elected to serve for the remainder of that term. All judges may run for an unlimited number of re-elections until the mandatory age of retirement, which is 70.¹⁹⁵ The senior judge in point of service serves as Chief Justice. Currently, Chief Justice Pascal Calogero, originally elected in 1972, is set to retire in 2008, the year before he turns 75 years old.¹⁹⁶ Thus, in 2008, a new justice will be elected from the First District, an extremely conservative district in Louisiana.¹⁹⁷

¹⁹² See Ed Anderson, *Foster Backs Cusimano For Supreme Court; Governor Hopes Endorsement of Conservative Challenger Will Tip Scales*, TIMES-PICAYUNE (New Orleans), Oct. 1, 1998, at A4, available at 1998 WLNR 1174228.

LABI [the Louisiana Association of Business and Industry] has successfully backed the election of three new justices to the court since 1994: Jeffery Victory, Chet Traylor and Jeannette Theriot Knoll. Traylor and Knoll unseated incumbent justices, the first time that had happened in more than 20 years. Foster joined the effort after his election in 1995, pushing an anti-trial-lawyer, pro-business outlook in his legislative agenda and his endorsements in judicial races, including Traylor and Knoll.

¹⁹³ Louisiana is one of the original four states' rights "Dixiecrat" states, and its representatives are responsible for the name given conservative Democrats in Congress, "Blue Dog Democrats," in that the group originally met in the offices of Louisiana representatives Billy Tauzin (who later switched to the Republican party) and Jimmy Hayes underneath Cajun artist George Rodrigue's famous "Blue Dog" paintings.

¹⁹⁴ "The current Supreme Court is difficult at times to figure ideologically Generally, Calogero and Justice Bernette Johnson line up on the liberal side, with justices John Weimer, Knoll and Catherine Kimball providing swing votes. Victory is joined on the conservative side by Traylor." Alan Sayre, *Incumbent Supreme Court Justice Faces One Challenger*, ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 10, 2004, available at WLNR 18728874; see also Torres and Swerczek, *Political Tilt Of Supreme Court At Stake In Election; Low Turnout Expected For Oct. 20 Primary*, TIMES-PICAYUNE (New Orleans), Oct. 14, 2001, at 1, available at 2001 WLNR 1072132 ("Most observers agree the court has two conservative-leaning judges, two liberals and two that act as swing votes.").

¹⁹⁵ Judges elected to the judiciary before adoption of the 1974 state Constitution, such as Justice Calogero, must retire at age 75. Judges elected after 1974 are forced to retire at 70. See Joe Gyan, *Change On The Venue For State's High Court*, BATON ROUGE ADVOCATE, June 30, 2000, at 9-B, available at 2000 WLNR 8132328.

¹⁹⁶ *Id.*

¹⁹⁷ This district was carved out of a larger district which encompassed New Orleans through a series of compromises, legislative acts, and court rulings related to a settlement of a civil rights suit in 1992. Between the settlement agreement and the legislative acts, two districts were created: District 1, Justice Calogero's district which

Under the Louisiana Constitution, the jurisdiction of the Court in civil cases extends to both law and facts.¹⁹⁸ In criminal matters, its jurisdiction extends only to questions of law.¹⁹⁹ The Court has appellate jurisdiction in cases in which a law or ordinance has been declared unconstitutional and in capital cases where the death penalty has been imposed. These cases originate at the trial court level but bypass review by the intermediate courts of appeal in order to be heard directly by the Court. All other cases are taken up by the Court on a discretionary basis through a writ process. The Court has supervisory jurisdiction over all courts.

Unusually, every member of the Louisiana Supreme Court was born in Louisiana, raised in Louisiana and attended both college and law school in Louisiana.

Biographical information of the current members of the Louisiana Supreme Court

Member	Appointed by / Year	Term Expires	Miscellaneous
Chief Justice Pascal Calogero	Elected / 1972; Re-elected / 1974, 1988, 1998 from District 1;	Retires in 2008	-Biographical information: Born 1934; ²⁰⁰ J.D., Loyola School of Law, 1954 (1 st in class); ²⁰¹ LLM in Judicial Process, University of Virginia, 1992; Captain, US Army, MP & JAG, 1954-57; private practice, 1957-1972; ²⁰² -Social/political affiliations:

is comprised of predominantly white parishes north of New Orleans, and District 7, now Justice Johnson's district, which is comprised of predominantly African American Orleans Parish (although there is now some issue as to the demographics of Orleans Parish post Hurricane Katrina. Joe Gyan, Jr., *Marcus Stepping Down From La. High Court*, BATON ROUGE ADVOCATE, Aug. 30, 2000, at 4-B, available at 2000 WLNR 8123430.

¹⁹⁸ LA. CONST. art. V, § 5(C).

¹⁹⁹ *Id.*

²⁰⁰ Justice Calogero is the son of a New Orleans police officer and the grandson of an Italian immigrant merchant seaman.

²⁰¹ Justice Calogero served as president of the Student Editorial Board of the Loyola Law Review.

²⁰² Justice Calogero was the law partner of the former mayor of New Orleans, Moon Landrieu. Mayor Landrieu was also Secretary of HUD under President Carter and a circuit court judge in Louisiana until 2000. He is the father of Mary Landrieu, U.S. Senator from Louisiana, Mitch Landrieu, Lieutenant Governor of Louisiana, and Madeline Landrieu, judge of the civil district court for the Parish of Orleans.

			Democrat. -Judicial evaluations: Considered one of the two more liberal judges on the bench. ²⁰³
Catherine “Kitty” Kimball	Elected / 1982; Re-elected / 1990, 1998 (without opposition)	2008; will be next Chief Justice if re-elected	-Biographical information: Born 1945; B.S. LSU; J.D., LSU, 1970. ²⁰⁴ 1970-1982, Asst. district attorney, general counsel to the Louisiana Commission on Law Enforcement, special counsel to the Louisiana Attorney General; 1982-1992, trial court judge; -Social/political affiliations: Democrat. -Judicial evaluations: Often the swing vote; devoted to women’s and children’s issues. ²⁰⁵
Bernette J. Johnson	Elected / 1994; Re-elected / 2000	2010 ²⁰⁶	-Biographical information: Born 1940s; B.A., Spelman College, 1964; ²⁰⁷ J.D., Louisiana State University Law School, 1969; ²⁰⁸ Honorary Doctorate of Laws, Spelman College, 2001 ²⁰⁹ ; 1960s, community organizer with the NAACP Legal Defense

²⁰³ According to at least one commentator, Justice Calogero “never wrote an opinion without considering the case from every angle, and always decided cases based strictly upon the facts and a reasoned application of the law.” Roger A. Stetter, *Chief Justice Pascal F. Calogero, Jr.: A Man and His Work*, 52 LA. B. J. 452 (2005).

²⁰⁴ Justice Kimball was one of only eight women in her law school class.

²⁰⁵ Justice Kimball serves or has served on the Governor’s Commission on Child Support, the Louisiana Coordinating Council on Domestic Violence, and the Louisiana Task Force on Women in the Courts. In 1998, because she frequently saw children who never heard a kind word appear before her in court, she and a friend helped form the You Are Sunshine Foundation, Inc. Her friend authored a children’s book on self-esteem which the Foundation, with the help of the National Guard, distributes each year to every kindergartener in the state of Louisiana. See *The Sunshine Project*, at <http://www.sunshinefoundationinc.org> (last visited Aug. 9, 2007).

²⁰⁶ As noted above, Orleans has traditionally been majority African American. However, in 2005, Hurricane Katrina caused a large percentage of that population to move away from New Orleans. It is unknown what effect that may have on Justice Johnson’s bid for re-election; however, the African American mayor of New Orleans was re-elected in 2006 albeit with a large Caucasian vote.

²⁰⁷ Justice Johnson graduated as valedictorian of her high school.

²⁰⁸ She was one of the first African American women to attend Louisiana State University’s Law Center.

²⁰⁹ Upon graduating from law school, Justice Johnson spent most of her legal career working for the poor and disadvantaged.

			<p>and Educational Fund; 1969-1984, law intern with the U.S. Department of Justice, Civil Rights Division, legal services attorney with the New Orleans Legal Assistance Corporation; 1984-1994, district court judge.²¹⁰</p> <p>- Social/political affiliations; Democrat.</p> <p>-Judicial evaluations:²¹¹ Considered to be the most liberal justice on the court; however, actively involved in a Full Gospel Baptist Church.²¹²</p>
Jeffrey P. Victory	Elected / 1995; Re-elected / 2004 from District 2	2014	<p>-Biographical information: Born 1946; B.A., Centenary College (History and Government);²¹³ J.D. Tulane Law School, 1971;²¹⁴ 1971-1981, La. National Guard²¹⁵ and private practice; 1981-1991, trial court judge; 1991-1995, appellate court judge.²¹⁶</p>

²¹⁰ She was the first woman elected to the civil district court in New Orleans, a position to which she was re-elected without opposition in 1990. She was elected Chief Judge of that court in 1994.

²¹¹ Justice Johnson has served as Chair of the New Orleans Chapter of the Southern Christian Leadership Conference SCLC/Women and is the former Chair of the National Bar Association Judicial Council. She has served on the Board of the New Orleans YWCA and is Chair of the Board of Directors of the Greater St. Stephen Full Gospel Baptist Church Learning Center.

²¹² Clancy Dubos, editor and columnist for the *Gambit Weekly* newspaper in New Orleans, has observed that “[Justice] Johnson is a liberal Democrat whose philosophical compass is hardly in sync with that of [U.S. Supreme Court Justice] Thomas. As judges, they can safely be said to be near-polar opposites. Clancy Dubos, *Standing Up to the PC Gendarmes*, WEEKLY WIRE, June 15, 1998, at http://www.weeklywire.com/ww/06-15-98/gambit_pol.html (noting that Justice Johnson stood up to the National Bar Association when she invited Justice Clarence Thomas to speak at that organization over great objection. Besides, she told one group of black lawyers, “[s]ometimes you have to make peace with your enemies.”); see also Gwen Filosa, *Justices Ready For Their Close-up; Documentary Goes Inside La’ s Top Court*, TIMES-PICAYUNE (New Orleans), Mar. 20, 2005, at 1, available at 2005 WLNR 4367144 (“In contrast, Johnson espouses more liberal views, often as a lone dissenter.”)

²¹³ A private Methodist college in Shreveport which he attended on an athletic scholarship.

²¹⁴ Served on Tulane Law Review.

²¹⁵ While at Tulane, he joined the Louisiana National Guard serving in the Special Forces, Airborne Division.

²¹⁶ Justice Victory has been the Director of the Louisiana Judicial College, the entity which provides continuing legal education for judges at all levels of the Louisiana judiciary, for many years.

			-Social/political affiliations: Republican. -Judicial evaluations: Considered one of the most conservative judges on the Court ²¹⁷
Jeannette T. Knoll	Elected / 1996; Re-elected without opposition / 2006	2016	-Biographical information: Born 1940s; ²¹⁸ B.A., Loyola University, 1966 (Political Science; History); ²¹⁹ J.D. Loyola, 1969; LLM Judicial Process, UVA, 1996; 1969-1982, private practice, asst. district attorney, public defender; ²²⁰ 1982-1996, appellate court judge ²²¹ -Professional/social affiliations: Democrat. -Judicial evaluations: ²²² Considered one of the most conservative judges on the Court.
Chet D. Traylor	Elected / 1996; Re-elected without opposition / 2006	2016	-Biographical information: Born 1940s; B.A. Government Northeast La. State University 1969 (Government); J.D. Loyola University School of Law, 1974; US Army MP; ²²³ La. State

²¹⁷ See Anderson, *supra* note. During his 2004 re-election campaign, Victory's campaign website did not deny his conservative bent, proclaiming that he has "been recognized as the leader of conservative reform in Louisiana law" and "who believes that judges should follow the laws of the land and not try to make them." Sayre, *supra* note. In fact, when the Forum For Equality filed suit to enjoin the enforcement of the Louisiana constitutional amendment recognizing marriage as only between a man and a woman, they moved to have Justice Victory recused from the case because, during his 2004 campaign for re-election he had taken a position in support of the amendment. See Joe Gyan, *Supreme Court Approves Same-Sex Ballot*, BATON ROUGE ADVOCATE, Sept. 3, 2004, available at <http://www.freerepublic.com/focus/f-news/1206536/posts>.

²¹⁸ Justice Knoll was one of ten children.

²¹⁹ Justice Knoll has a beautiful voice and earned a scholarship at age eighteen to study voice with the Metropolitan Opera.

²²⁰ Justice Knoll practiced law with her husband in the family firm for thirteen years during which time she served as assistant district attorney under her husband who was the district attorney for Avoyelles Parish for thirty years.

²²¹ Justice Knoll was the first woman to be elected to a Louisiana appellate court.

²²² She is the former chair of the March of Dimes and a member of the Louisiana Cattleman's Association.

²²³ Justice Traylor served in the U.S. Army as a Military Police Investigator for two years and in that limited time achieved the rank of E-5 sergeant.

			<p>Police officer;²²⁴ 1974-1985, private practice, asst. district attorney;²²⁵ 1985-1996, trial court judge;</p> <p>-Social/political affiliations: Republican.</p> <p>-Judicial evaluations: Considered one of the most conservative judges on the Court²²⁶</p>
John L. Weimer	Elected / 2001; Re-elected / 2002	2012	<p>-Biographical information: Born 1943; B.S. with honors, Nicholls State University, 1976; J.D., Louisiana State University Law School, 1980; 1980-1995, private practice; 1982-1997; professor of law at Nicholls State University; 1995-1998; trial court judge; 1998-2001, appellate court judge.</p> <p>-Social/political affiliations: Democrat.</p> <p>-Judicial evaluations:²²⁷ Considered one of the most conservative judges on the court.²²⁸</p>

²²⁴ Justice Traylor also served as an Investigator for the Louisiana Department of Justice, Organized Crime and Racketeering Unit.

²²⁵ He has also served as the legal advisor to the Louisiana State Police Narcotics, Detectives and Intelligence units.

²²⁶ See Filosa, *supra* note ("Justice Chet Traylor, one of the most conservative voices on a court already considered conservative . . ."). He is a life member of the National Rifle Association, is the founder of the John Adams Chapter of Greenwings, and was the first president of the Winnsboro Ducks Unlimited. He is a member of the Methodist church.

²²⁷ Justice Weimer has been actively involved with the Chamber of Commerce, serving as its legal counsel for years, and with the Rotary Club. He also served as a volunteer firefighter for years.

²²⁸ *Id.* He has been called a "principled man who is not afraid to fight for what is right." Blake M. Petit, *Weimer Elected to Louisiana State Supreme Court*, ST. CHARLES HERALD-GUIDE, Nov. 21, 2001, available at www.heraldguide.com/news/nov01/weimerelected.htm; see also Joe Gyan, Jr., *Supreme Court Election Vote In 6th District Scheduled Oct. 20*, BATON ROUGE ADVOCATE, Aug. 19, 2001, at 1-A, available at 2001 WLNR 10338871 ("Weimer, 46, says in all cases he evaluates the law and the facts and comes to "a just and wise conclusion. 'I strive to be fair in all matters. I am not result oriented.'") He is believed to "enforce the law and resist the temptation to legislate from Louisiana's highest bench. *Id.* quoting James Wooton, president of the Chamber of Commerce's Institute For Legal Reform.

CONCLUSION

The people of Louisiana, as well as their elected representatives, have evidenced the utmost respect for life. Ninety percent of the state characterizes itself as Christian, with sixty percent being evenly split between Catholics and Baptists, both denominations known for their strong right-to-life stand.²²⁹ But it is the philosophy of life in Louisiana that most affects the people's stand on pro-life issues. In a state known for the expression *laissez les bon temps rouler*,²³⁰ and its infective *joie de vivre*, its strong pro-life stand is not a surprise - for one cannot have such a hearty and carefree enjoyment of life if one does not have a love and respect for life.

²²⁹ *Louisiana: Religion*, WIKIPEDIA, at <http://en.wikipedia.org/wiki/Louisiana#Religion> (last visited Aug. 9, 2007).

²³⁰ Translation: "Let the good times roll!"