

MISSED OPPORTUNITIES IN *MCCORVEY V. HILL*: THE LIMITS OF PRO-CHOICE LAWYERING

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I. INTRODUCTION

I was invited to participate in this symposium as a practitioner. I am the founder of National Advocates for Pregnant Women (NAPW), an organization that was incorporated in 2001 to ensure, among other things, that women do not lose their civil or human rights upon becoming

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pregnant. In the course of my career, I have had the privilege of working in many of the mainstream pro-choice organizations. I have also been fortunate to work closely with the founders and leaders of the Reproductive Justice Movement.¹ As a result of this work, I came to believe that approaching cases like lawyers may blind us to a wide variety of advocacy tools that are as important, if not more important, than legal arguments, and that thinking like pro-choice lawyers may blind us to the larger political issues at stake in the ongoing effort to overturn *Roe v. Wade*.

I believe that too often attacks on *Roe v. Wade* are treated as if they are just attacks on the right to choose abortion. However, because the vast majority of women who have abortions have previously, or one day, will give birth, the arguments made to overturn *Roe* and re-criminalize abortion have implications far beyond the issue of abortion. They also affect women who become pregnant and carry a child to term.² Sixty-one percent of women who have abortions are already mothers who have previously given birth.³ By the age of forty-four, eighty-five percent of all women in the United States bring life into the world.⁴ By nearly the same age, approximately one third of women, most of them mothers, will have had an abortion.⁵ If “pro-choice” advocates keep responding to efforts to

1. Reproductive justice can be defined as “the complete physical, mental, spiritual, political, economic, and social well-being of women and girls, and will be achieved *when women and girls have the economic, social and political power and resources to make healthy decisions about our bodies, sexuality and reproduction for ourselves, our families and our communities in all areas of our lives.*” ASIAN CMTYS. FOR REPROD. JUSTICE, A NEW VISION FOR ADVANCING OUR MOVEMENT FOR REPRODUCTIVE HEALTH, REPRODUCTIVE RIGHTS, AND REPRODUCTIVE JUSTICE 1 (2005) (emphasis in original), <http://reproductivejustice.org/assets/docs/ACRJ-A-New-Vision.pdf>. The reproductive justice movement uses a multi-dimensional approach that recognizes that women cannot achieve reproductive health or exercise their reproductive rights unless large economic, social, and political issues are also addressed. For insight into the women of color leaders who developed the Reproductive Justice framework, see generally Jael Silliman, Marlene Gerber Fried, Loretta Ross & Elana Gutierrez, *Undivided Rights: Women of Color Organize for Reproductive Justice* (2004); Video: *In Defense of Roe* (Nat’l Advocates for Pregnant Women 2009), <http://www.vimeo.com/4873057> (documenting a 1989 conference featuring many of the women of color leaders who would later develop the Reproductive Justice framework).

2. *Cf.* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (explaining that the decision in *Roe v. Wade* “had been sensibly relied upon to counter” attempts to interfere with a woman’s decision to become pregnant or to carry to term).

3. Rachel K. Jones, Jacqueline E. Darroch & Stanley K. Henshaw, *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, 34 *PERSP. ON SEXUAL & REPROD. HEALTH* 226, 230 (2002).

4. *CTRS. FOR DISEASE CONTROL & PREVENTION, DEP’T OF HEALTH & HUMAN SERVS., MORBIDITY AND MORTALITY WEEKLY REPORT: RECOMMENDATIONS TO IMPROVE PRECONCEPTION HEALTH AND HEALTH CARE — UNITED STATES 2* (2006).

5. *An Overview Of Abortion In The United States*, GUTTMACHER INST., <http://www.guttmacher.org/media/presskits/2005/06/28/abortionoverview.html> (last visited Apr. 26, 2010).

re-criminalize abortion only by arguing for the legality of abortion, then we accept a narrow image of women as “people who have abortions” rather than as people who sometimes have abortions and far more often have children and take responsibility for raising them and caring for them and the homes they live in.⁶

By recognizing that *Roe* and the debate around it also affects mothers, “pro-choice” activists can more effectively challenge the existing framework that falsely suggests that there are two kinds of women: those who have abortions and those who have babies. If pro-choice advocates acknowledge that the vast majority of women who have abortions are the same women who have babies, they have the opportunity to reframe the debate. They will also find many more potential allies to work with to ensure not only the right to choose abortion, but also to advocate for the social and economic conditions necessary to enable pregnant women to make real choices.

Arguments challenging *Roe* also have implications for a wide range of public health, public policy, and social justice issues, including health care, family leave, and child welfare. As discussed below, the arguments against *Roe* raise core issues about whether public policy should be judged based on false claims about science and history, misinformation about the extent to which current laws protect people from discrimination, and misleading information about the government services available to support pregnant women, mothers, children, and families. By recognizing that *Roe* and the arguments against it implicate a wide range of vital public health, economic, and social justice policy issues beyond abortion, “pro-choice” advocates again can find more allies to join them in defending *Roe* and the pregnant women and mothers who sometimes have abortions.

One case, *McCorvey v. Hill*, illustrates how the pro-choice movement missed critical opportunities to build alliances across the range of issues and movements necessary to protect the rights and dignity of all pregnant women. In 2003, Norma McCorvey, the original “Jane Roe” in *Roe v. Wade*,⁷ sought to overturn the decision in *Roe* by filing a Rule 60(b) motion for relief from the judgment in federal court.⁸ Yet not a single pro-choice group filed an *amicus* brief defending *Roe*. By contrast, the anti-choice community rallied around the case: Two *amicus* briefs were filed in support of Ms. McCorvey’s appeal to the Fifth Circuit.⁹ An additional

6. See, e.g., JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 2 (2000) (stating that women “do 80 percent of the child care and two-thirds of the housework” in America).

7. *Roe v. Wade*, 410 U.S. 113 (1973).

8. *McCorvey v. Hill*, 385 F.3d 846, 847 (5th Cir. 2004).

9. Brief for Ester Ripplinger as Amicus Curiae Supporting Appellant, *McCorvey v. Hill*, 385 F.3d 846 (2004) (No. 03-10711), 2003 WL 24016582; Brief for Texas Black Americans for Life & the Life Education and Resource Network as Amici Curiae in

eleven briefs were filed on her behalf in support of her petition to the Supreme Court.¹⁰

As I discuss in this article, from a narrow institutional and legal perspective, my colleagues and lawyers from the leading pro-choice legal and political organizations were absolutely right in their decision not to oppose *McCorvey*. From a larger political and cultural perspective, however, I believe that ignoring this case was a mistake. The pro-choice movement failed to appreciate how serious and strategic anti-choice activists are when they bring cases unlikely to win in the short term. As discussed below, the efforts of anti-choice activists keep public debate focused on abortion rather than other important issues of our day. Their false claims about science and history, if repeated often enough and left unchallenged, become more likely to be believed and relied upon by judges and policy makers. Furthermore, the more we permit anti-choice activists to frame the issue as a question of abortion's legality and morality, rather than as a question of the rights and dignity of pregnant women and mothers, the more dominant this frame becomes in the public debate. The pro-choice movement's stunning non-response reflects two concepts that are relevant to this *Page to Practice Symposium*. First, thinking like lawyers blinds us to a wide variety of advocacy tools that are as important as, if not more important than, legal arguments. Second, thinking like pro-choice lawyers blinds us to the larger political issues at stake in the ongoing effort to overturn *Roe v. Wade* and deny women their civil and human rights.

Support of Appellant, *McCorvey v. Hill*, 385 F.3d 846 (2004) (No. 03-10711), 2003 WL 24016584.

10. Brief for Administer Justice & the Ctr. for Law and Culture as Amici Curiae in Support of Petitioner, *McCorvey v. Hill*, 543 U.S. 1154 (2005) (No. 04-967), 2005 WL 330768; Brief for Brenda Alexander as Amicus Curiae in Support of Petitioner, *McCorvey v. Hill*, 543 U.S. 1154 (2005) (No. 04-967), 2005 WL 320632; Brief for J. Budziszewski as Amicus Curiae in Support of Petitioner, *McCorvey v. Hill*, 543 U.S. 1154 (2005) (No. 04-967), 2005 WL 273755; Brief for Christian Legal Society as Amicus Curiae in Support of Petitioner, *McCorvey v. Hill*, 543 U.S. 1154 (2005) (No. 04-967), 2005 WL 377003; Brief for Maureen Curley, Mary Devine, Fran M. Black & Felix J. Callan as Amici Curiae in Support of Petitioner, *McCorvey v. Hill*, 543 U.S. 1154 (2005) (No. 04-967), 2005 WL 415094; Brief for Fetal Pain as Amicus Curiae in Support of Petitioner, *McCorvey v. Hill*, 543 U.S. 1154 (2005) (No. 04-967), 2005 WL 350210; Brief for Former California State Senator and Current California State Assemblyman Raymond S. Haynes & the U.S. Justice Foundation as Amicus Curiae in Support of Petitioner, *McCorvey v. Hill*, 543 U.S. 1154 (2005) (No. 04-967), 2005 WL 415093; Brief for Justine M. Kyker as Amicus Curiae in Support of Petitioner, *McCorvey v. Hill*, 543 U.S. 1154 (2005) (No. 04-967), 2005 WL 350211; Brief for the Nurturing Network, Heartbeat Int'l, Care Net, Nat'l Inst. of Family and Life Advocates, & Abortion Recovery Int'l Network as Amici Curiae in Support of Petitioner, *McCorvey v. Hill*, 543 U.S. 1154 (2005) (No. 04-967), 2005 WL 319933; Brief for Oil of Joy for Mourning, Inc., as Amicus Curiae Supporting Petitioner, *McCorvey v. Hill*, 543 U.S. 1154 (2005) (No. 04-967), 2005 WL 291415; Brief for Margie Reiley & Laurette Elsberry as Amici Curiae in Support of Petitioner, *McCorvey v. Hill*, 543 U.S. 1154 (2005) (No. 04-967), 2005 WL 291416.

Part II of this article describes the history of the *McCorvey* case. In Part III, I deconstruct some of the plaintiff's major arguments in *McCorvey* to show that cases like *McCorvey*, regardless of their outcome, are used to organize and build momentum for the abortion re-criminalization movement; to create the appearance of new science and scientific evidence that undermines the legitimacy of the decision in *Roe v. Wade*, and to distract attention from political issues around which there might be significant agreement across "pro-life" and "pro-choice" lines.¹¹ Part IV describes the opportunities that pro-choice groups missed when they chose not to file amicus briefs or otherwise challenge the case in the court system. I conclude by arguing that the failure to do cross-issue, multi-strategy work undermines the effort to defend *Roe v. Wade*, and more fundamentally, those women who become pregnant and sometimes have abortions.

II.

THE MCCORVEY CASE AND THE PRO-CHOICE RESPONSE

In 1970, Norma McCorvey, using the pseudonym "Jane Roe," filed a class action in federal court challenging a Texas statute that criminalized any abortion at any stage of pregnancy unless it was necessary to save the life of the mother.¹² A three judge panel in the U.S. District Court of the Northern District of Texas entered declaratory judgment stating that the Texas statutes criminalizing abortion were unconstitutionally overbroad and vague.¹³

The Supreme Court agreed. In its landmark decision in *Roe v. Wade*, the Supreme Court recognized that the right to choose to have an abortion is a fundamental right.¹⁴ While the Court permitted states to ban abortion after fetal viability,¹⁵ it reaffirmed the personhood of pregnant women by clarifying that, even after a fetus reaches the stage of viability, it is not a person for the purposes of the Fourteenth Amendment, and that the woman's life and health are paramount. Thus, a pregnant woman must be allowed to have an abortion, even after the fetus is viable, if necessary for

11. "Pro-life" and "anti-choice" do not necessarily mean the same thing. One can identify as pro-life and believe that embryos and fetuses should be valued as human life without supporting laws that would re-criminalize abortion or dehumanize pregnant women.

12. *See Roe*, 410 U.S. at 120.

13. *Roe v. Wade*, 314 F. Supp. 1217, 1225 (N.D. Tex. 1970).

14. *Roe*, 410 U.S. at 153-65 (locating a woman's right to decide whether or not to have an abortion in her right to privacy and explaining that where such "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest").

15. *Id.* at 163-64.

her life or health.¹⁶ There is no point in pregnancy when a woman loses her personhood. In deciding *Roe*, the Supreme Court effectively overturned all state and federal statutes criminalizing abortion.¹⁷

On January 14, 2003, more than thirty years after the Supreme Court decided *Roe v. Wade*, Norma McCorvey, previously known as Jane Roe, filed a Rule 60(b) motion for relief from the declaratory judgment in *Roe*. Claiming that the factual and legal landscape had changed significantly over the intervening three decades, Ms. McCorvey argued that the declaratory judgment is “no longer just or equitable for *Roe* to have prospective application.”¹⁸ The effect would have been to reopen not merely the *subject* of *Roe* but *Roe* itself, erasing the relief granted by the original district court and affirmed by the Supreme Court. As reported in the popular media, it would have “overturned” *Roe*.¹⁹

It was clear from the beginning that the case was unlikely to succeed. Rule 60 of the Federal Rules of Civil Procedure permits a party to seek relief from a final judgment where its enforcement is no longer equitable.²⁰ It does not alter the judgment (for example, the Supreme Court’s finding

16. *Id.* at 165 (holding that states may not proscribe abortion “where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother”).

17. Recent Supreme Court decisions have permitted significantly more state regulation of abortion than *Roe* and the decisions that followed in the nineteen years immediately after *Roe*. Compare, e.g., *Thornburgh v. Am. College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (holding several portions of a state statute imposing requirements on abortion providers, including the requirement that physician inform woman of detrimental physical and psychological effects and of all particular medical risks, to be unconstitutional), with *Gonzales v. Carhart*, 550 U.S. 124, 163–64 (2007) (holding that the absence of a health exception in a federal law banning pregnant women from obtaining certain abortion procedures did not render the law unconstitutional and noting that “[t]he medical uncertainty over whether the Act’s prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden”), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (holding that a Pennsylvania law that imposed informed consent requirements, a 24-hour waiting period, and parental consent requirements on women seeking abortions was constitutional because these conditions did not impose an undue burden on women’s ability to access abortions). After the Supreme Court held that a pregnant woman’s health is not always paramount in *Gonzales v. Carhart*, it is unclear whether *Roe* continues to protect pregnant women as full constitutional persons under the law.

18. Brief in Support of Rule 60 Motion for Relief from Judgment at 2, *McCorvey v. Hill*, No. 3:03-CV-1340-N (N.D. Tex. June 19, 2003), 2003 WL 23891671 [hereinafter Brief in Support of Rule 60 Motion] (citing *Agostini v. Felton*, 521 U.S. 203, 216 (1997)).

19. See, e.g., *Court Rejects Motion to Overturn Roe v. Wade*, CNN (Sept. 14, 2004), http://articles.cnn.com/2004-09-14/justice/roe.v.wade_1_norma-mccorvey-jane-roe-abortion-case?_s=PM:LAW (“A three-judge panel of a federal appeals court dismissed a motion Tuesday from the original plaintiff in *Roe v. Wade* to have the landmark 1973 abortion case overturned, a court clerk said.”); Amy Benfer, *Roe v. Choice*, SALON (July 14, 2009), http://www.salon.com/life/broadsheet/feature/2009/07/14/jane_roe_for_life (describing *McCorvey* as “a failed attempt to overturn the landmark decision that made [Norma McCorvey] an international symbol for women’s rights”).

20. FED. R. CIV. P. 60(b)(5).

of a “fundamental right” of abortion in *Roe v. Wade*), but rather excuses a party from performance or exempts it from penalties arising from that judgment. Under the Federal Rules of Civil Procedure, a 60(b) motion is reserved for extraordinary circumstances, such as fraud on the court, impossibility of performance, or a retroactive change in law rendering the judgment’s effects unjust.²¹ Such motions must be filed within a reasonable time.²² For motions based on mistake, newly discovered evidence, or fraud, the Rules prescribe that the motion must be made within one year of the proceeding or the entry of judgment.²³ Given the limits of Rule 60, it was unlikely that the Northern District of Texas would permit *McCorvey* to use the rule to reopen a thirty-year-old case with the sole goal of reversing the U.S. Supreme Court on a vital constitutional question.

Given the exceedingly small likelihood of success of winning a 60(b) motion, the pro-choice community’s reaction to *McCorvey* may be unsurprising. As noted above, not a single amicus brief was filed in favor of retaining *Roe v. Wade*.²⁴ Moreover, even the party being sued, William “Bill” Hills, the Dallas County District Attorney, declined to challenge the motion. When I asked a colleague at a mainstream pro-choice organization why pro-choice groups failed to organize any opposition to the *McCorvey* case, she explained that they did not think the courts would take the motion seriously, that they expected the motion to be dismissed as moot, and that they did not want to waste limited resources responding to outlandish legal arguments that had no chance of success.²⁵

It did not come as a surprise to anyone when the Northern District of Texas dismissed the action as untimely,²⁶ and the Court of Appeals for the Fifth Circuit dismissed it as moot.²⁷ Nor was there surprise when the U.S.

21. FED. R. CIV. P. 60(b).

22. FED. R. CIV. P. 60(c)(1).

23. *Id.*

24. While the case was on appeal before the Fifth Circuit, a “group of professors filed an amicus brief . . . asking the court to grant leave to allow them to argue” in favor of retaining *Roe*. John Council, *5th Circuit to Hear Arguments to Overturn Roe v. Wade*, LEGAL INTELLIGENCER, Feb. 20, 2004, available at 2004 WLNR 23401214. However, it does not appear that they actually filed a brief in the case.

25. The editors of this commentary asked why NAPW did not become involved in the case. In 2003, NAPW was only a few years old with only one lawyer on staff. Then, as now, there were many larger, well-established legal and political organizations devoted to defending the right to choose abortion. In light of this, NAPW focused its legal advocacy on cases that were much less popular and that received far fewer resources and attention – those involving pregnant women (including drug addicted pregnant women) who were not seeking to end their pregnancies. NAPW assumed that mainstream pro-choice legal groups were or would be directly involved in the *McCorvey* litigation.

26. *McCorvey v. Hill*, No. Civ. A. 303CV1340N, 2003 WL 21448388, at *3 (N.D. Tex. June 19, 2003).

27. *McCorvey v. Hill*, 385 F.3d 846, 850 (5th Cir. 2004).

Supreme Court then denied *certiorari*.²⁸

III.

THE APPARENT PURPOSE OF THE *MCCORVEY* LITIGATION

If the Rule 60(b) claim was such a sure loser, why did Norma McCorvey file it in the first place?

The legal team behind the case surely knew that their motion was unlikely to succeed.²⁹ Ms. McCorvey's case was filed by a team of experienced attorneys, including Allen Parker and Harold Cassidy. Allen Parker, an attorney with thirty-one years of experience, is the president of the Justice Foundation, an organization that frequently files amicus briefs seeking to advance a conservative legal agenda.³⁰ Harold Cassidy is a veteran trial lawyer who has spent years litigating cases challenging the right to choose abortion.³¹

Winning in the short term, however, is not always the point. Ms. McCorvey and her supporters were not merely making legal arguments about abortion; they were making political arguments about the status of women, the role of science, and the role of government in the lives of ordinary people. The main arguments in *McCorvey* clarify this point. The petitioner claimed that the legal and factual circumstances of abortion had so dramatically changed since 1973 that *Roe* no longer has any valid basis. Ms. McCorvey's motion, and the briefs in support of it, focused on several alleged changes. I will focus on three of them.³² First, McCorvey argued

28. *McCorvey v. Hill*, 543 U.S. 1154 (2005).

29. Thomas Korosec, *Bid to Reopen Roe Case Fails*, HOUSTON CHRON., Sept. 15, 2004, at B1, available at <http://www.chron.com/disp/story.mpl/metropolitan/2796224.html> ("Allen E. Parker, a lawyer for McCorvey, said he was not surprised that his bid to reopen the controversial case has lost in the lower courts. 'It was expected,' said Parker . . .").

30. See, e.g., *Allan E. Parker, Jr.*, JUSTICE FOUND., <http://www.txjf.org/pages.asp?pageid=27745> (last visited Nov. 5, 2010) (Alan Parker "has represented clients free of charge in cases of limited government, private property, free markets, parental school choice, parental rights in education, and enforcing laws to protect women's health. Mr. Parker serves as the lead legal counsel for Norma McCorvey, who was 'Jane Roe' of *Roe v. Wade*, and Sandra Cano, who was 'Mary Doe' of *Doe v. Bolton*, in the legal effort to overturn their landmark Supreme Court rulings that brought legalized abortion on demand in America.").

31. See, e.g., Sarah Blustain, *The Right Not to Choose: TAP talks to prominent anti-abortion lawyer Harold Cassidy*, AM. PROSPECT, Apr. 13, 2007, available at http://www.prospect.org/cs/articles?article=the_right_not_to_choose (interview with Cassidy on his work to limit abortion rights).

32. In addition to the arguments I discuss, Ms. McCorvey and her lawyers also argued that "the abortion industry fails to create a normal doctor patient relationship." Brief in Support of Rule 60 Motion, *supra* note 18, at 30–33. No amicus briefs were filed on behalf of abortion providers and organizations that represent them, such as the National Abortion Federation. These providers could have talked about the extraordinary measures used to ensure high standards of care, and the extent to which abortion is far more closely regulated than most other forms of health care.

that new scientific knowledge, which was unavailable to the Supreme Court in 1973, now establishes the “humanity of the unborn child” and that “[w]hen considering a mother and her unborn child” science has now clearly proven that “the Court is dealing with two persons.”³³ Second, she claimed that experience with legal abortion since 1973 now reveals that abortion harms women.³⁴ Finally, she alleged that, as a result of changes in the social, medical and legal context, no woman suffers the burden of unwanted motherhood.³⁵ While these arguments might not succeed in a court of law, Ms. McCorvey and her team of lawyers apparently understood that they could, nevertheless, have persuasive effect in the court of public opinion, reframing how people think about pregnant women and their status in society and under the law. As I discuss below, failing to respond to these arguments puts pregnant women and the right to choose abortion in greater peril.

A. McCorvey’s Claim: New Scientific Evidence Requires Roe’s Reversal

McCorvey’s brief challenged the reasoning of the *Roe* decision on numerous levels, including the medical and scientific information considered by the court. In doing so, McCorvey asserted that the issue of abortion could be resolved by reference to objective science, without having to consider or in any way take into account the implications for women’s dignity and personhood. According to the brief, the “Court has treated the question of when human life begins as a matter of opinion, belief, or a point of view because until now it has not been presented with clear and compelling new scientific evidence which allows the matter to be resolved scientifically rather than through opinion.”³⁶ Drawing from obstetrics, biology, genetics, and embryology, the *McCorvey* brief claimed that “[n]ew scientific and medical evidence and advances in technology since 1973” demonstrate that the beginning of human life can now be established as a scientific matter.³⁷

McCorvey claimed that “[a]n explosion of medical and scientific knowledge regarding the humanity of the unborn child has occurred since the Court’s original ruling in *Roe*.”³⁸ The brief claimed that a distinctive human life definitively starts at the moment of fertilization, which is the moment at which there is a pairing of paternal and maternal

33. *Id.* at 28–29.

34. *Id.* at 35–43.

35. *Id.* at 24–27 (describing how so-called “Baby Moses” laws eliminate the burden of unwanted motherhood).

36. *Id.* at 30.

37. *Id.* at 28, 30.

38. Brief in Support of Rule 60 Motion, *supra* note 18, at 29.

chromosomes.³⁹ It argued that an embryo becomes genetically unique at this moment.⁴⁰ Because of this, the brief asserted that the embryo is a nascent but full human being that should be legally disconnected from the woman upon whom it depends and treated as if it were a fully separate person with legal rights under the U.S. Constitution.⁴¹ McCorvey's brief also cited new technologies, such as "[a]dvances in ultrasound technology," which "now make it possible to see even the eyebrows and eyelashes of unborn children."⁴²

McCorvey's focus on new scientific and medical evidence serves four strategic purposes. First, it keeps the discussion centered on eggs, embryos, and fetuses rather than the pregnant woman. In doing so, it undermines efforts to ensure that women's health, legal rights, and dignity are fully and fairly considered.

Second, by focusing on the science of fetal development and claiming it is "new," McCorvey shifts attention away from the profound and devastating implications of overturning one of *Roe's* central premises, which is that embryos and fetuses are not separate legal "persons" for the purposes of the Fourteenth Amendment.⁴³ Legally separating fertilized eggs, embryos and fetuses from the pregnant women who carry them not only provides the basis for once again criminalizing abortion, it also provides the basis for denying to all pregnant women—even ones who have no intention of ending their pregnancies—all of their constitutional rights, including their right to life. This fact was clearly demonstrated in the Angela Carder case.⁴⁴ In 1987, the claim that a fetus may be legally disconnected from the pregnant woman was used to force Ms. Carder to undergo cesarean surgery against her will.⁴⁵ The fetus was born alive but

39. *Id.* at 50–51 ("Medical science now clearly shows that a new human life begins at conception. With 46 chromosomes, it is a member of our species and no other.")

40. *Id.* at 29 ("When considering a mother and her unborn child, the fact that the Court is dealing with two persons can be very clearly and solidly proven. DNA technology, previously unavailable to the Court, can remove any doubt in this regard. If a DNA sample from the mother's arm and one from her child in the womb are sent anonymously to a DNA testing lab for identification, the lab will report that two separate humans are reflected in the samples. If samples from the mother's arm and leg, parts of her 'own body' were sent, testing would show only one person is involved, the same person.")

41. *Id.* at 50–51 ("To say that this new human being from the moment of conception is not a person in the legal sense is to say that there are human beings who are not persons. . . . In *Roe* the personhood of the unborn child is completely ignored which allows their death.")

42. *Id.* at 29.

43. *Roe v. Wade*, 410 U.S. 113, 157–58 (1973) ("[T]he word 'person,' as used in the Fourteenth Amendment, does not include the unborn."). While the Court noted that "the unborn have never been recognized in the law as persons in the whole sense," *id.* at 162, the Court specifically declined to rule on when life begins, *id.* at 159.

44. *In re A.C.*, 573 A.2d 1235, 1253 (D.C. 1990) (en banc).

45. Lynn M. Paltrow, *Do Pregnant Women Have Rights?*, ALTERNET (April 22, 2004), <http://www.alternet.org/story/18493> [hereinafter Paltrow, *Do Pregnant Women Have*

did not survive; Angela Carder died two days later, with the cesarean surgery listed as a contributing factor. In Ms. Carder's case, the forced medical intervention not only deprived her of her rights to reproductive decision-making, bodily integrity, informed consent, and due process of law, but also of her right to life.⁴⁶ While an appellate court posthumously vacated the court-ordered surgery, the argument that fetuses may be treated as separate legal persons and that pregnant women may be deprived of their status as full legal persons and forced to submit to major surgery keeps reemerging.⁴⁷ Arguments that focus on seemingly objective science distract attention from such cases and the fact that women's status as full legal persons is at stake.

Third, the claim of "new" scientific evidence distorts history in an attempt to make it appear that there are new facts and circumstances that justify re-examining *Roe*. The history of the litigation in *Roe* makes clear that the core scientific claims presented by McCorvey were not unknown to science or to the Supreme Court in 1973.

More than thirty-eight years ago, the State of Texas made similar claims about "new" science when *Roe* was being argued before the Supreme Court. For example, the State's brief defending the Texas anti-abortion law described in extraordinary detail "how clearly and conclusively modern science—embryology, fetology, genetics,

Rights?) (describing the Angela Carder case). For a discussion of some of the issues arising out of court-ordered pregnancy procedures, see Lawrence J. Nelson & Nancy Milliken, *Compelled Medical Treatment of Pregnant Women: Life, Liberty and Law in Conflict*, 259 J. AM. MED. ASS'N 1060, 1065 (1988) (noting the "troublesome questions" that surround court-ordered obstetric procedures for the benefit of fetuses and discouraging the recognition of "fetal rights that would create an adversarial relationship between a pregnant woman and her fetus").

46. Paltrow, *Do Pregnant Women Have Rights?*, *supra* note 45. See also Terry E. Thornton & Lynn Paltrow, *The Rights of Pregnant Patients: Carder Case Brings Bold Policy Initiatives*, HEALTHSPAN, May 1991, at 10–16 (describing the policy adopted by the hospital in the Angela Carder case to prevent compelled-treatment interventions in the future and to restore decision-making power to "the patient in consultation with her loved ones and treating physicians," and urging the implementation of similar policies by other hospitals).

47. See *Pemberton v. Tallahassee Mem'l Reg'l Med. Ctr., Inc.*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999) (documenting a court-ordered cesarean surgery and refusing to find that any civil rights had been violated when police took a pregnant woman laboring at home into custody and forced her to undergo the surgery); *Burton v. Florida*, 49 So.3d 263 (Fla. Dist. Ct. App. 2010) (overturning court order detaining pregnant woman at hospital and forcing her to undergo cesarean surgery); *In re Fetus Brown*, 689 N.E.2d 397, 400 (Ill. App. Ct. 1997) (overturning a court-ordered blood transfusion of a pregnant woman); *In re Baby Boy Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994) (holding that courts may not balance whatever rights a fetus may have against the rights of a competent woman, whose choice to refuse medical treatment as invasive as a cesarean surgery must be honored even if the choice may be harmful to the fetus); *In re A.C.*, 573 A.2d 1235, 1253 (D.C. 1990) (en banc) (vacating a court-ordered cesarean surgery that was listed as a contributing factor to the mother's death on her death certificate).

perinatology, all of biology—establishes the humanity of the unborn child.”⁴⁸ The State devoted more than twenty-four pages of its brief to the argument that “modern science” established the need for laws criminalizing abortion.⁴⁹ An amicus brief, filed in support of the Texas law by “certain physicians, professors and fellows of the American College of Obstetrics and Gynecology,” made the same argument.⁵⁰ Both of these briefs included ten pages of photographs showing in graphic detail the stages of fetal development.⁵¹ In the 1972 oral argument before the Supreme Court, Robert C. Flowers, the Texas Assistant Attorney General, claimed that the “medical research” highlighted in the briefs supported Texas’s law banning women from having abortions.⁵²

Nevertheless, McCorvey argued that much of the same information was so “new” as to justify a full-scale reconsideration of *Roe*. McCorvey’s brief, for example, cited new technologies such as “[a]dvances in ultrasound technology” that “now make it possible to see even the eyebrows and eyelashes of unborn children.”⁵³ Yet images of fetal development have long been available and, as noted above, had been used in the original litigation in an effort to persuade the Supreme Court to uphold the Texas law criminalizing abortion. It is true that the pictures of fetal development in the original *Roe* briefs were in black and white, not in Technicolor. Advances in imaging technology, however, including the claimed ability to now see eyelashes on fetuses,⁵⁴ do not provide a new scientific basis for legally separating embryos and fetuses from pregnant women or for overturning the decision in *Roe*. Similarly, McCorvey relied on such things as the number of chromosomes a fetus has and the genetic distinctiveness of embryos and fetuses as part of her “new” evidence.⁵⁵ Yet cytologists Joe Hin Tjio and Albert Levan definitively determined that

48. Brief for Appellee at 31, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 134281.

49. *Id.* at 29–54.

50. Brief for Certain Physicians, Professors and Fellows of the Am. College of Obstetrics and Gynecology as Amici Curiae in Support of Appellees at 2–3, *Roe v. Wade*, 410 U.S. 113 (1973) (No. 70-18), 1971 WL 128057 (stating that the brief seeks “to place before this Court the scientific evidence of the humanity of the unborn so that the Court may know and understand that the unborn are developing human persons who need the protection of law just as do adults”).

51. Brief for Appellee, *supra* note 48, at 35–51.

52. See Video: *Roe v. Wade: "New" Science & the Old Geography of Pregnancy*, NAT’L ADVOCATES FOR PREGNANT WOMEN (Jan 21, 2010), <http://www.youtube.com/user/NAPW#p/a/u/0/XgfJtJZ8-xg> (playing portions of the recording of the oral argument in *Roe v. Wade* and showing pages from the briefs depicting fetal development).

53. Brief in Support of Rule 60 Motion, *supra* note 18, at 29.

54. *Id.* at 29.

55. *Id.* at 29, 50–51.

there were forty-six chromosomes in 1956.⁵⁶ While new information can be a valid basis for reexamining an old opinion or point of view, here it is clear that old information was being mischaracterized as new in an ongoing effort to legitimize the same old legal and political arguments used in 1973.

Failure to respond to both new and old scientific arguments leaves pro-choice advocates vulnerable on many levels. The claim that new science supports the argument that fertilized eggs are entitled to unprecedented legal rights seems to be a successful strategy for recruiting new anti-choice activists, who have only heard one side of the story. As one woman wrote in her affidavit in support of McCorvey's motion, "Look at science, it proves this is a human being."⁵⁷ People will continue to hear only one side of the story if the pro-choice movement does not respond.

Moreover, findings can gain respect and legitimacy despite the fact that what is being promoted may actually be junk science, biased-agenda-driven (b.a.d.) science, or scientific research that does not support the claims being made. For example, affidavits filed by certain M.D.'s and Ph.D.'s in support of McCorvey's motion cited scientific research regarding fetal responses to external stimuli.⁵⁸ While some of the research may have in fact been "new," the conclusion reached based on that research—that "unborn children are sensitive to pain from the time of conception"⁵⁹—was not, in fact, supported by science.⁶⁰ Numerous other examples of junk science and b.a.d. science are discussed as well in Section B below.

Finally, "new" science claims regarding fetal development are persuasive to some federal court judges, particularly conservative judges who may be predisposed to strike down *Roe*. Fifth Circuit Judge Edith H. Jones, a well-known conservative,⁶¹ wrote a concurring opinion in the

56. Joe Hin Tjio & Albert Levan, *The Chromosome Number in Man*, 42 HEREDITAS 1, 1-6 (1956).

57. Affidavit of Deborah C. Howard, in Affidavit of Norma McCorvey, et al. at App. 98, *McCorvey v. Hill*, No. 3:03-CV-1340-N (N.D. Tex. June 19, 2003) [hereinafter *McCorvey Affidavits*].

58. *McCorvey v. Hill*, 385 F.3d 846, 852 n.6 (5th Cir. 2004) (Jones, J., concurring).

59. *See id.*

60. Marlana Sobel, *Abortion Myths*, FREEDOM WRITER, July 1994, <http://www.publiceye.org/ifas/fw/9407/myths.html> ("The perception of pain is a complex biological and psychological phenomena that involves certain states of 'consciousness' that would be impossible to achieve at the time of conception."). *See also* Susan J. Lee, Henry J. Peter Ralston, Eleanor A. Drey, John Colin Partridge & Mark A. Rosen, *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 J. AMER. MED. ASSOC. 947, 947 (2005) ("Evidence regarding the capacity for fetal pain is limited but indicates that fetal perception of pain is unlikely before the third trimester.").

61. Prior to her appointment to the bench in 1985 by President Ronald Reagan, Ms. Jones had been general counsel for the Texas Republican Party. Korosec, *supra* note 29. Once on the bench, her rulings were perceived as conservative, particularly her opinion in *Barnes v. Mississippi*, 992 F.2d 1335 (5th Cir. 1993) which upheld a two-parent consent

McCorvey case, agreeing that it was moot but using *McCorvey*'s arguments to legitimize the claim that new scientific information could provide a basis for some day overturning *Roe*. In her opinion, she asserted that:

[N]eonatal and medical science, summarized by *McCorvey*, now graphically portrays, as science was unable to do 31 years ago, how a baby develops sensitivity to external stimuli and to pain much earlier than was then believed. In sum, if courts were to delve into the facts underlying *Roe*'s balancing scheme with present-day knowledge, they might conclude that the woman's "choice" is far more risky and less beneficial, and the child's sentience far more advanced, than the *Roe* Court knew.⁶²

Indeed, Judge Jones' opinion finally demonstrated to some pro-choice activists that what had been dismissed as a mere "publicity stunt" could be taken very seriously, not only by the public but by a sitting Federal Appeals Court judge. According to the *Houston Chronicle*:

Abortion rights advocates who initially labeled *McCorvey*'s suit a publicity stunt said Jones' concurring opinion shows how fragile abortion rights have become in the courts. "The good news is the 5th Circuit threw the case out," said Sarah Wheat, a spokeswoman for the Texas Abortion and Reproductive Rights Action League. "The fact that they even agreed to hear the case and that Judge Jones would issue such a powerfully worded attack on choice shows how the future of reproductive choice is hanging in the balance."⁶³

By failing to respond to *McCorvey*'s arguments, pro-choice legal advocates did not give the other members of the court either information with which to challenge Judge Jones' point of view or motivation to publish an opinion of their own discussing the continuing importance and vitality of *Roe* to women's status as full persons under the U.S. Constitution. Instead, Judge Jones' opinion, based on *McCorvey*'s junk-science, went unchallenged. As *McCorvey* accurately observed in her brief to the Fifth Circuit, "There was not even a scintilla of evidence in opposition to the Motion."⁶⁴

requirement, with a judicial bypass provision, for minors prior to obtaining an abortion. See *Who is Edith Jones*, ACSBLOG (Sept. 29, 2005 1:56 PM), <http://www.acslaw.org/node/10134> (providing background on Justice Jones).

62. See *McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring).

63. Korosec, *supra* note 29.

64. Brief of Appellant Norma *McCorvey* at 6, *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2003) (No. 03-10711), 2003 WL 24016583 [hereinafter Brief of Appellant Norma *McCorvey*].

B. *McCorvey's Claim: Abortion Hurts Women*

Another key argument in support of *McCorvey's* motion was that abortion actually hurts women. The *McCorvey* briefs were supported by affidavits from women responding to four standardized questions: 1) “[W]hen and where [did] your abortion occur[. . . ?];” 2) “[H]ow has your abortion affected you?;” 3) “[W]hat would you tell a woman considering an abortion?;” 4) “[W]hat would you tell a court that believes abortion should be legal?”⁶⁵ The women were reached through forms on anti-choice websites, including the website for the Elliot Institute, an organization founded by the leading proponent of the faux science “post-abortion syndrome.”⁶⁶

In each affidavit, the women described negative emotional and/or physical consequences they claimed were caused by their abortions. The answers typically mention “depression,”⁶⁷ “guilt,”⁶⁸ “low self-esteem,”⁶⁹ “mental anguish,” “shame,”⁷⁰ and “emotional” and “spiritual” harm.⁷¹ For

65. *E.g.*, Affidavit of Cheryl Allen, *in McCorvey Affidavits*, *supra* note 57, at App. 43.

66. *See* Press Release, Elliot Institute, Post-Abortive Women To Overturn *Roe v. Wade*, (May 5, 2001), <http://afterabortion.info/news/OperationOC.html> (describing efforts to give women who had abortions a voice in courts and directing them to forms used as affidavits in *McCorvey*).

67. *E.g.*, Affidavit of Lisa K. Arnold, *in McCorvey Affidavits*, *supra* note 57, at App. 45; Affidavit of Catherine C. Barnella, *in McCorvey Affidavits*, *supra* note 57, at App. 48; Affidavit of Karen A. Bellmore, *in McCorvey Affidavits*, *supra* note 57, at App. 50; Affidavit of M.J.B., *in McCorvey Affidavits*, *supra* note 57, at App. 55; Affidavit of B.H., *in McCorvey Affidavits*, *supra* note 57, at App. 96; Affidavit of E.K.J., *in McCorvey Affidavits*, *supra* note 57, at App. 100; Affidavit of Katy Smith, *in McCorvey Affidavits*, *supra* note 57, at App. 141; Affidavit of T.T., *in McCorvey Affidavits*, *supra* note 57, at App. 146; Affidavit of Marelean Thomas, *in McCorvey Affidavits*, *supra* note 57, at App. 147; Affidavit of Beth Ann Valentine, *in McCorvey Affidavits*, *supra* note 57, at App. 149; Affidavit of Mary Ellen York, *in McCorvey Affidavits*, *supra* note 57, at App. 160.

68. *E.g.*, Affidavit of Terri Baxter, *in McCorvey Affidavits*, *supra* note 57, at App. 49; Affidavit of Karen A. Bellmore, *supra* note 67, at App. 50; Affidavit of R.G., *in McCorvey Affidavits*, *supra* note 57, at App. 86; Affidavit of Tinya E. Harper, *in McCorvey Affidavits*, *supra* note 57, at App. 89; Affidavit of B.H., *supra* note 67; Affidavit of Lynn C. Hurley, *in McCorvey Affidavits*, *supra* note 57, at App. 99; Affidavit of E.K.J., *supra* note 67; Affidavit of Patricia A. Johnson, *in McCorvey Affidavits*, *supra* note 57, at App. 102; Affidavit of B.G.M., *in McCorvey Affidavits*, *supra* note 57, at App. 119; Affidavit of R.W.R., *in McCorvey Affidavits*, *supra* note 57, at App. 134; Affidavit of Amy Shatrck, *in McCorvey Affidavits*, *supra* note 57, at App. 138; Affidavit of Beth Ann Valentine, *supra* note 67, at App. 147; Affidavit of Mary Ellen York, *supra* note 67 (discussing guilt).

69. *E.g.*, Affidavit of Elizabeth Campbell, *in McCorvey Affidavits*, *supra* note 57, at App. 58; Affidavit of Lawrie J. Sikkema, *in McCorvey Affidavits*, *supra* note 57, at App. 139 (discussing low self-esteem).

70. *E.g.*, Affidavit of RAC, *in McCorvey Affidavits*, *supra* note 57, at App. 69; Affidavit of R.G., *supra* note 68; Affidavit of Lynn C. Hurley, *supra* note 68; Affidavit of B.G.M., *supra* note 68; Affidavit of Beth Ann Ward, *in McCorvey Affidavits*, *supra* note 57, at App. 153 (discussing feelings of shame or being ashamed).

71. *E.g.*, Affidavit of Katrina L. Brummett, *in McCorvey Affidavits*, *supra* note 57, at App. 56; Affidavit of Cheryl A. Derstine, *in McCorvey Affidavits*, *supra* note 57, at App.

instance, one affiant stated that, “I know God loves me, but I can’t feel it.”⁷² Some specifically describe having post-abortion syndrome or trauma.⁷³

The affiants also made claims about the physiological harms of abortion. However, instead of simply describing personal experience, they offered a steady stream of unsubstantiated and unqualified medical opinions about a wide range of physical harm purportedly caused by the abortion procedure. According to the affidavits, abortion causes miscarriages in subsequent pregnancies, sterility,⁷⁴ “[p]re-term pregnancies, abnormal paps, and abnormal periods.”⁷⁵ In response to the question about what women would tell a court that believes abortion should be legal, one woman wrote, “I would tell of the hidden statistics of the many long-term effects women suffer in relation to having an abortion such as miscarriage, reproductive problems, and the mental anguish of taking a life.”⁷⁶ Other claims made in the affidavits were that abortion was linked to breast cancer,⁷⁷ that abortion led some women to attempt suicide or have suicidal thoughts,⁷⁸ and that abortion caused drug and alcohol problems.⁷⁹ Some women also claimed they were not fully informed of what an abortion entails or the emotional consequences they would

76; Affidavit of B.G.M., *supra* note 68; Affidavit of Terri White, *in* *McCorvey Affidavits*, *supra* note 57, at App. 156 (discussing emotional and spiritual harm).

72. Affidavit of Wilma Boehmer, *in* *McCorvey Affidavits*, *supra* note 57, at App. 53.

73. *E.g.*, Affidavit of B.C., *in* *McCorvey Affidavits*, *supra* note 57, at App. 65; Affidavit of L.M.C., *in* *McCorvey Affidavits*, *supra* note 57, at App. 72; Affidavit of M.H., *in* *McCorvey Affidavits*, *supra* note 57, at App. 87; Affidavit of Patricia A. Johnson, *supra* note 68, at App. 103; Affidavit of Shannon L. McGuire, *in* *McCorvey Affidavits*, *supra* note 57, at App. 112 (discussing post-abortion trauma).

74. *E.g.*, Affidavit of Lisa K. Arnold, *supra* note 67; Affidavit of P.C., *in* *McCorvey Affidavits*, *supra* note 57, at App. 62; Affidavit of Bethann Pritchard, *in* *McCorvey Affidavits*, *supra* note 57, at App. 130 (discussing sterility).

75. Affidavit of Susan L. Babcock, *in* *McCorvey Affidavits*, *supra* note 57, at App. 46.

76. *Id.* at App. 47.

77. *E.g.*, Affidavit of Terri Baxter, *supra* note 68; Affidavit of S.D., *in* *McCorvey Affidavits*, *supra* note 57, at App. 75 (discussing breast cancer). The alleged link between breast cancer and abortion has been shown to be false by the National Cancer Institute, among other organizations. *E.g.*, *Abortion, Miscarriage, and Breast Cancer Risk*, NAT’L CANCER INST. (JAN. 12, 2010), <http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage>.

78. *E.g.*, Affidavit of Melanie L. Mills, *in* *McCorvey Affidavits*, *supra* note 57, at App. 115; Affidavit of Lawrie J. Sikkema, *supra* note 69 (discussing suicidal thoughts).

79. *E.g.*, Affidavit of Suzanne M. Bishop, *in* *McCorvey Affidavits*, *supra* note 57, at App. 51; Affidavit of Dawn M. Erickson, *in* *McCorvey Affidavits*, *supra* note 57, at App. 79; Affidavit of Melissa Hodges, *in* *McCorvey Affidavits*, *supra* note 57, at App. 95; Affidavit of Kelly L. Kelchner, *in* *McCorvey Affidavits*, *supra* note 57, at App. 103; Affidavit of Debra Ann Mays, *in* *McCorvey Affidavits*, *supra* note 57, at App. 110; Affidavit of Mary L. Neikam, *in* *McCorvey Affidavits*, *supra* note 57, at App. 122; Affidavit of Julie R. Wesley, *in* *McCorvey Affidavits*, *supra* note 57, at App. 155 (discussing substance abuse).

experience,⁸⁰ and that they had, in short, been “duped.”⁸¹ Many described abortion as killing⁸² or murder.⁸³

The affidavits overwhelmingly placed abortion in a religious context, describing it as “an act against God”⁸⁴ and made clear that women’s sentiments after an abortion were often strongly influenced by religious ideology. As one woman wrote, “It took me 20 years to come back into a relationship with God because I was afraid he hated me for what I had done.”⁸⁵ Many women described living with the fear that God will punish or judge them. One woman wrote, “It has always been a struggle for me to not think that God would ‘take’ my other children as punishment for what

80. *E.g.*, Affidavit of Terrie Coleman, *in* *McCorvey Affidavits*, *supra* note 57, at App. 68; Affidavit of S.D., *in* *McCorvey Affidavits*, *supra* note 57, at App. 74 (discussing being inadequately informed).

81. Affidavit of Nicole W. Cooley, *in* *McCorvey Affidavits*, *supra* note 57, at App. 71.

82. *E.g.*, Affidavit of Lisa K. Arnold, *supra* note 67; Affidavit of Catherine C. Barnella, *in* *McCorvey Affidavits*, *supra* note 57, at App. 49; Affidavit of Terrie Coleman, *supra* note 80, at App. 69; Affidavit of Jerrell Ann Farmer, *in* *McCorvey Affidavits*, *supra* note 57, at App. 81; Affidavit of Karen Ruth Hartman, *in* *McCorvey Affidavits*, *supra* note 57, at App. 91; Affidavit of B.H., *supra* note 67, at App. 97; Affidavit of Lynn C. Hurley, *supra* note 68; Affidavit of P.B., *in* *McCorvey Affidavits*, *supra* note 57, at App. 113; Affidavit of Melanie L. Mills, *supra* note 78, at App. 116; Affidavit of B.G.M., *supra* note 68; Affidavit of Maranda Music, *in* *McCorvey Affidavits*, *supra* note 57, at App. 121; Affidavit of Christian M. Ongley, *in* *McCorvey Affidavits*, *supra* note 57, at App. 125; Affidavit of Pamela D. Pigott, *in* *McCorvey Affidavits*, *supra* note 57, at App. 130; Affidavit of Patricia Pulliam, *in* *McCorvey Affidavits*, *supra* note 57, at App. 132; Affidavit of Lynn Rasberry, *in* *McCorvey Affidavits*, *supra* note 57, at App. 133; Affidavit of Sherri Suminski, *in* *McCorvey Affidavits*, *supra* note 57, at App. 145 (discussing abortion as killing).

83. *E.g.*, Affidavit of Cheryl Allen, *in* *McCorvey Affidavits*, *supra* note 57, at App. 43; Affidavit of Susan L. Babcock, *supra* note 75, at App. 47; Affidavit of Karen A. Bellmore, *supra* note 67, at App. 51; Affidavit of S.C., *in* *McCorvey Affidavits*, *supra* note 57, at App. 60; Affidavit of Wendy Chestnut, *in* *McCorvey Affidavits*, *supra* note 57, at App. 63; Affidavit of Amy M. Childers, *in* *McCorvey Affidavits*, *supra* note 57, at App. 64; Affidavit of B.C., *supra* note 73, at App. 66; Affidavit of Elizabeth Cleigh, *in* *McCorvey Affidavits*, *supra* note 57, at App. 67; Affidavit of M.A.C., *in* *McCorvey Affidavits*, *supra* note 57, at App. 72; Affidavit of Terry Daly, *in* *McCorvey Affidavits*, *supra* note 57, at App. 74; Affidavit of Cheryl A. Derstine, *in* *McCorvey Affidavits*, *supra* note 57, at App. 76; Affidavit of Dawn M. Erickson, *supra* note 79, at App. 79, 80; Affidavit of Janice L. Gilliland, *in* *McCorvey Affidavits*, *supra* note 57, at App. 83; Affidavit of R.G., *supra* note 68; Affidavit of Tinya E. Harper, *supra* note 68, at App. 90; Affidavit of K.M.H., *in* *McCorvey Affidavits*, *supra* note 57, at App. 94; Affidavit of Deborah C. Howard, *in* *McCorvey Affidavits*, *supra* note 57; Affidavit of Catherine Kimball, *in* *McCorvey Affidavits*, *supra* note 57, at App. 106; Affidavit of M.L.M., *in* *McCorvey Affidavits*, *supra* note 57, at App. 118; Affidavit of Bethann Pritchard, *supra* note 74, at App. 131; Affidavit of Amy Shatrick, *supra* note 68, at App. 139; Affidavit of Michelle Stewart, *in* *McCorvey Affidavits*, *supra* note 57, at App. 144; Affidavit of Marelean Thomas, *supra* note 67, at App. 148; Affidavit of Karen L. Waring, *in* *McCorvey Affidavits*, *supra* note 57, at App. 154; Affidavit of Catherine C. Wilson, *in* *McCorvey Affidavits*, *supra* note 57, at App. 158; Affidavit of Mary Ellen York, *supra* note 67 (discussing abortion as murder).

84. Affidavit of Dawn M. Erickson, *supra* note 79, at App. 80.

85. Affidavit of Lisa K. Arnold, *supra* note 67.

I had done to that first baby.”⁸⁶ Another explained, “Later when I became pregnant I thought that I would lose that child, I thought that God would punish me for the first baby by taking the second one.”⁸⁷

Similarly, answers to the question about what the affiants would tell a woman considering an abortion and a court that believes abortion should be legal often referenced God, The Lord, and Christ.⁸⁸ Many of the affiants advise other women to “SEEK CHRISTIAN GUIDANCE”⁸⁹ and “GET TO KNOW GOD.”⁹⁰ They warn women and judges that God will judge them for what they have done. One affiant specifically wrote to the court, “I would say that I would not want to be in their shoes on judgment day.”⁹¹ Another admonished that, “[I]f life begins at conception, God says thou shall not kill anyone including babies created in his image. By legalizing abortion every ‘Judge’ carries the blood of the innocent on their hands.”⁹² One affiant warned other women:

You may not experience any affects [sic] from the abortion right away but the pain is still there whether you want to confront it or not and your day will come like min[e] did whether its here on earth or when you have taken your last breath and face your

86. Affidavit of Terrie Coleman, *supra* note 80.

87. Affidavit of Robin Montgomery, *in* *McCorvey Affidavits*, *supra* note 57, at App. 116–17.

88. *E.g.*, Affidavit of Karen A. Bellmore, *supra* note 67; Affidavit of S.C., *supra* note 83; Affidavit of Elizabeth Cleigh, *supra* note 83, at App. 66; Affidavit of K.G., *in* *McCorvey Affidavits*, *supra* note 57, at App. 82; Affidavit of Karen Ruth Hartman, *supra* note 82; Affidavit of S.H., *in* *McCorvey Affidavits*, *supra* note 57, at App. 92; Affidavit of Dianne L. Hensley, *in* *McCorvey Affidavits*, *supra* note 57, at App. 93; Affidavit of K.M.H., *supra* note 83; Affidavit of B.H., *supra* note 67; Affidavit of Deborah C. Howard, *supra* note 57, at App. 97; Affidavit of Kelly L. Kelchner, *supra* note 79, at App. 104; Affidavit of Kristen Kelley, *in* *McCorvey Affidavits*, *supra* note 57, at App. 105; Affidavit of Catherine Kimball, *supra* note 83; Affidavit of S.C.K., *in* *McCorvey Affidavits*, *supra* note 57, at App. 107; Affidavit of T.M., *in* *McCorvey Affidavits*, *supra* note 57, at App. 114; Affidavit of Robin Montgomery, *supra* note 87, at App. 117; Affidavit of Pamela D. Pigott, *supra* note 82, at App. 129; Affidavit of Lynn F. Raspberry, *supra* note 82, at App. 133; Affidavit of R.W.R., *supra* note 68; Affidavit of Dorothy Rogers, *in* *McCorvey Affidavits*, *supra* note 57, at App. 135; Affidavit of Gayle Schroeder, *in* *McCorvey Affidavits*, *supra* note 57, at App. 136; Affidavit of L.V., *in* *McCorvey Affidavits*, *supra* note 57, at App. 151; Affidavit of Catherine C. Wilson, *supra* note 83 (referencing God and Christ).

89. Affidavit of D.K.C., *in* *McCorvey Affidavits*, *supra* note 57, at App. 61 (capitalization in original).

90. *Id.* at App. 62 (capitalization in original). *See also* Affidavit of Shawn Doctor, *in* *McCorvey Affidavits*, *supra* note 57, at App. 77 (“Don’t ignore the subtle voice from within that tells you it’s wrong. That is the voice of God pleading with you to keep your child alive.”).

91. Affidavit of Lisa Harrison Anthony, *in* *McCorvey Affidavits*, *supra* note 57, at App. 44.

92. Affidavit of Suzanne M. Bishop, *in* *McCorvey Affidavits*, *supra* note 57, at App. 52.

Heavenly Father to give an accounting of your life.⁹³

Another woman wrote, “[R]epent. Receive Jesus Christ as your Savior! Then fall on your face in worship and praise and call the Holy Spirit to protect you both from the ravening wolves that do seek to devour and destroy you both. Study the Bible daily.”⁹⁴ Some of the affiants also speak specifically to the proper role of women, arguing that “[a]bortion is the exact opposite of what women were and are created to do.”⁹⁵

McCorvey’s claim that abortion causes psychological harm, however, is not supported by evidence-based research on the subject. Peer reviewed scientific research has not found that abortion causes psychological harm or “post-abortion syndrome.”⁹⁶ Nor has peer reviewed research found a link between abortion and breast cancer or between abortion and the other health problems women described in their affidavits.⁹⁷ Yet these claims, many made in non-expert affidavits, were repeatedly described as “evidence” in the McCorvey appellate brief,⁹⁸ and mistakenly accepted as such by Judge Jones,⁹⁹ rather than as anecdotes or stories that may or may not have helped to elucidate legal arguments made in the case. These claims, however, have gained significant traction in the public discourse and have increasingly become the basis for state legislation further limiting access to abortion services.¹⁰⁰

These arguments have also gained increasing traction with the judiciary. As no contrary evidence was before the *McCorvey* court, Circuit Judge Edith Jones was able to repeat and legitimize the faux science of “post-abortion syndrome” in her concurring opinion. Three years later, in *Gonzales v. Carhart*,¹⁰¹ the Supreme Court for the first time upheld a

93. Affidavit of Elizabeth Cleigh, *in* McCorvey Affidavits, *supra* note 57, at App. 67.

94. Affidavit of Melinda L. James, *in* McCorvey Affidavits, *supra* note 57, at App. 101. *See also id.* at App. 102 (“Abortion is an abomination to our Creator and to all creation.”).

95. Affidavit of Cheryl A. Derstine, *in* McCorvey Affidavits, *supra* note 57, at App. 76.

96. *See, e.g., Post Abortion Syndrome*, NAT’L ABORTION FED’N, http://www.prochoice.org/about_abortion/myths/post_abortion_syndrome.html (last visited Dec. 1, 2010) (summarizing studies disproving “post-abortion syndrome”); Pam Chamberlain, *Politicized Science, How Anti-Abortion Myths Feed the Christian Right Agenda*, PUB. EYE, Summer 2006, at 2, 4, available at http://www.publiceye.org/magazine/v20n2/chamberlain_politicized_science.html (same).

97. *See* Chamberlain, *supra* note 96, at 3 (summarizing studies disproving a link between abortion and breast cancer).

98. Brief of Appellant Norma McCorvey, *supra* note 64, at 35.

99. *See* McCorvey v. Hill, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring). *See also* McCorvey case dismissed, INTERIM (Oct. 9, 2004, 12:10 PM) <http://www.theinterim.com/issues/abortion/mccorvey-case-dismissed> (“More than 5,000 pages of evidence including affidavits from more than 1,000 women damaged by abortion were submitted by McCorvey.”) (emphasis mine).

100. *See* Chamberlain, *supra* note 96, at 3 (“By 2005, lawmakers in every state legislature in the country have filed bills that either require women to receive biased counseling about the risks of abortion or impose mandatory waiting periods.”).

101. 550 U.S. 124 (2007).

federal law banning women from having certain kinds of abortion procedures even when the procedure is necessary to preserve their health. One basis for this ruling was Justice Kennedy's suggestion in the majority opinion that having such abortions would cause women to suffer emotional harm:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. The Act recognizes this reality as well. Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. *Severe depression and loss of esteem can follow.*¹⁰²

While Justice Kennedy's assertion, by his own admission, is based on supposition, not reliable data, it nevertheless provides those who seek to recriminalize abortion with ammunition in their campaign to reverse *Roe*. Significantly, Kennedy relied on the same affidavits that were submitted in *McCorvey*.¹⁰³

Moreover, in soliciting these affidavits, the anti-choice movement appropriated the truth-telling speak-outs that were once one of the pro-choice movement's most effective strategies. Members of Redstockings, a radical feminist group, are credited with organizing one of the first speak-outs by pregnant women about their experiences with illegal abortion.¹⁰⁴ After legislative hearings about New York's abortion law featured male speakers and only one woman, who was a Catholic nun, Members of Redstockings responded by holding their own hearing, the Redstockings' abortion speak-out, on March 21, 1969.¹⁰⁵ At this event, some women spoke about having illegal abortions, while others described their experiences of carrying their babies to term and the pain they experienced when they gave up their children for adoption.¹⁰⁶

Following this example, early feminist lawyers used speak-outs as effective tools in the effort to overturn anti-abortion laws. For example, attorneys who were challenging New York's anti-abortion law insisted that depositions of women who had illegal abortions be public,¹⁰⁷ thus transforming a formal legal mechanism for gathering evidence into public speak-outs. In fact, "Silent No More," Ms. McCorvey's anti-abortion

102. *Id.* at 159 (emphasis added).

103. See Reva Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1644-47 (2008).

104. DIANE SCHULDER & FLORENCE KENNEDY, ABORTION RAP 3-4 (1971).

105. *Id.* at 4.

106. *Id.*

107. *Id.* at 95-96.

ministry, was the name of a 1985, post-*Roe*, NARAL campaign that organized men and women to speak out about why they or someone they knew had had an abortion.¹⁰⁸ These letters then became the basis of an amicus brief submitted to the U.S. Supreme Court—the first time the personal experiences of women were used in a Supreme Court brief. In that case, the letters were not intended to replace actual evidence, but rather to illustrate and “elucidate the strong constitutional foundation” for the Supreme Court’s decision in *Roe v. Wade*.¹⁰⁹

While Ms. McCorvey’s effort to overturn *Roe* failed, those supporting her turned the effort into an effective movement-building experience, likely winning loyalty and commitment from many of the women who signed the affidavits. They used the extensive collection of affidavits to reframe abortion as an assault on women’s health and well-being and to advance their positions in other political efforts to undermine *Roe* and prevent women from having access to legal abortion services in the United States.¹¹⁰ Indeed, the Justice Foundation that represented Ms. McCorvey subsequently used these affidavits as support for South Dakota’s 2006 law proposing to ban virtually all women from having abortions in that state.¹¹¹

Although *McCorvey* could have been an opportunity for pro-choice lawyers to gather stories about the personal and public health value of legal abortion or to develop new, passionate, funny, or creative responses to the argument that women are actually hurt by abortion, the mainstream

108. *History of NARAL Pro-Choice America*, NARAL: PRO-CHOICE AM., <http://www.prochoiceamerica.org/assets/files/about-naral-history.pdf> (last visited Apr. 26, 2011).

109. Lynn M. Paltrow, *Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists*, 9 WOMEN’S RTS. L. REP. 3, 4 (1986) (discussing how letters collected by NARAL as part of its Silent No More Campaign were used for the first time in Supreme Court litigation to illustrate the constitutional interests at stake in the abortion debate). See also Assoc. Press, “Pro-Choice” Groups File Brief: High Court Urged to Uphold Abortion Right, WASH. POST, Aug. 31, 1985, at A22 (“A coalition of ‘pro-choice’ groups urged the Supreme Court yesterday to reaffirm its 1973 decision legalizing abortion including letters from women about their abortions represented an extraordinary, perhaps unprecedented, move for a filing with the court.”); Assoc. Press, *Coalition Seeks High Court Support on Abortion*, N.Y. TIMES, Sept. 1, 1985, at 29 (“[A] coalition of abortion-rights groups has filed a brief asking the Supreme Court to reaffirm its 1973 decision legalizing abortion. The brief . . . included excerpts from letters from women about their abortions, an extraordinary move for a filing with the Court. The National Abortion Rights Action League and other groups in the coalition said the excerpts would help “to place the realities of abortion in women’s lives before this Court.”).

110. See Siegel, *supra* note 103, at 1644–47 (2008) (discussing the role of the affidavits in debates over state abortion bans and the anti-abortion movement as a whole).

111. *Id.* The South Dakota bill, ultimately repealed by voter referendum, made it a felony to “knowingly . . . [cause] or [abet] the termination of the life of an unborn human being” from “fertilization to full gestation and birth.” Women’s Health and Human Life Protection Act, 2006 S.D. Sess. Laws 119 (repealed 2006). See also Reva Siegel & Sarah Blustein, *Mommy Dearest?*, AM. PROSPECT, Oct. 2006, at 22, available at <http://prospect.org/cs/articles?articleId=12011>.

pro-choice movement let the courts handle it.

C. McCorvey's Claim: Abortion is Unnecessary, as Women No Longer Experience Any Burdens from Unwanted Pregnancies

The *McCorvey* brief's argument about the burdens of unwanted pregnancy most clearly demonstrates the larger strategy behind the litigation. According to *McCorvey*, *Roe* should be overturned because unwanted motherhood is no longer a burden.¹¹² *McCorvey* argued that, "Texas, along with all other states will pay for all medical expenses associated with pregnancy for the needy"¹¹³ and that "[w]omen can no longer be fired or discriminated against at work if they are pregnant."¹¹⁴ Her brief thus suggests that there are no economic burdens associated with birth and pregnancy. She also argued that women are entirely free from the burden of caring for the child after birth due to the "Safe Haven" laws that have been passed in forty states.¹¹⁵ Texas's law, often called the "Baby Moses" law,¹¹⁶ allows a woman who has gone to term without planning for an adoption to leave a child under sixty days old with a designated emergency infant care provider, including hospitals, fire rescue stations, or Emergency Medical Services stations.¹¹⁷ The law also purports to protect parents from the application of the state's law prohibiting the abandonment or endangerment of a child if they deliver an unharmed child to a designated emergency infant care provider.¹¹⁸ According to *McCorvey's* brief, as a result of this law, "[a] pregnant woman can freely separate herself from the child without the guilt and shame that comes from the intentional killing of her child."¹¹⁹

The claims made in this section of the brief are patently false. While the brief implies that the state of Texas will ensure that pregnant women will get access to medical care, the brief offers no supporting citations for this claim. In reality, significant bureaucratic burdens make it difficult even for pregnant women who are eligible for Medicaid to access health care.¹²⁰

112. Brief in Support of Rule 60 Motion, *supra* note 18, at 24–27.

113. *Id.* at 24.

114. *Id.* at 27.

115. See, e.g., *Law Details and Safe Haven Organizations by State*, NAT'L SAFE HAVEN ALLIANCE, <http://www.nationalsafehavenalliance.org/states/> (last visited Apr. 26, 2011).

116. See, e.g., Brief in Support of Rule 60 Motion, *supra* note 18, at 24; *Baby Moses Law Information*, SAN MARCOS (TEX.) FIRE DEP'T, <http://www.ci.sanmarcos.tx.us/departments/fire/BabyMoses.htm> (last visited Apr 26, 2011).

117. TEX. FAM. CODE ANN. § 262.301–02 (Vernon 2008).

118. See TEX. FAM. CODE ANN. § 262.301–09 (Vernon 2008).

119. Brief of Appellant Norma McCorvey, *supra* note 64, at 40.

120. AMNESTY INT'L, DEADLY DELIVERY: THE MATERNAL HEALTH CARE CRISIS IN THE UNITED STATES 42–43 (2010) (describing how "[b]ureaucratic procedures, including in-person interviews and burdensome and costly documentation requirements, coupled with

Women need more than just payment for “medical expenses” to take advantage of medical services. They must also have access to transportation to get to those services, have access to child care, and be able take time off from school or work.¹²¹

The McCorvey brief also makes the spectacular claim that, as of 2003, no pregnant woman now need fear discrimination in the workplace. This claim is made in the face of huge gaps in laws prohibiting such discrimination, leaving millions of women without protection.¹²² For example, in 1978 the Pregnancy Discrimination Act (“PDA”),¹²³ which prohibits workplace discrimination, was passed as an amendment to Title VII. While this legislation was a major accomplishment, it does not protect all pregnant women. The PDA does not require employers to provide disability leave or medical coverage for pregnant employees, nor does it apply to employers of fewer than fifteen people, or to women who work part-time.¹²⁴ The Federal Government, private clubs, and religious organizations are also exempt from the PDA.¹²⁵ It is estimated that more than one-third of working women are not covered by the PDA.¹²⁶

Similarly, the claim that Safe Haven laws make pregnancy burden-free is without support. Such laws merely provide some protection for women who have not planned in advance to put their newborns up for adoption. Those laws offer no guarantee about what will happen to those children once left at a designated location. Moreover, they do not, as the McCorvey brief claims, allow a woman to “simply abandon an ‘unwanted’ child at a hospital, clinic or emergency room within sixty (60) days of birth *with no questions asked* and no threat of *criminal prosecution*.”¹²⁷ The law only protects parents who leave “unharmful” children from prosecution under the state’s abandonment statute, and does not protect parents from prosecution under other criminal laws. As a result, the State may still investigate to determine if the Safe Haven law even applies and if parents have “harmed” the child before any of the promised confidentiality and

the shortage of case workers to process applications, pose significant obstacles and delays to accessing services” and, as a result, that women receiving Medicaid often do not receive prenatal care beginning in the first trimester).

121. *Id.* at 47. Other barriers that prevent women having access to health care services may include whether a woman has somewhere to live and enough food to eat, or whether issues such as domestic violence are addressed. *Id.*

122. See generally NAT’L ADVOCATES FOR PREGNANT WOMEN, GUIDE TO PREGNANCY DISCRIMINATION IN EMPLOYMENT (2006), <http://advocatesforpregnantwomen.org/06CFinalDraft.pdf> (identifying large numbers of pregnant women who are not covered by current employment discrimination statutes).

123. *Id.* at 2.

124. *Id.* at 3.

125. *Id.*

126. *Id.*

127. Brief in Support of Rule 60 Motion, *supra* note 18, at 24 (emphasis added).

protections from prosecution are recognized.¹²⁸

Moreover, the implication of McCorvey's argument is not just that a woman who abandons her child at birth will not be arrested, but that she need not worry about that child because it will be well cared for by someone. According to McCorvey, because of the Baby Moses Law, "there is no longer a need to seek an abortion to avoid any 'unwanted' burdens of motherhood: As a matter of law and uncontested fact, the State of Texas will help the mother and assume *all* of the responsibilities, financial *and otherwise*, of raising the child."¹²⁹ McCorvey's brief, however provides no support for the suggestion that children in or out of the state's custody are ensured adequate health care, enough food to eat, or a life above the poverty line. In fact, the claim the child will be well cared for once in the hands of the State of Texas, and specifically the state's child protection agency, is belied by reports about the agency and children in its care.¹³⁰ Texas was and continues to be a state in which children languish in foster care.¹³¹ In 2003, while 2,444 Texas foster children were adopted, another 3,786 remained in foster or institutional care.¹³² Indeed, "[t]he proportion of Texas foster children trapped in the worst form of substitute 'care'—institutionalization—was eighty percent above the national average."¹³³

Moreover, Texas has historically failed to provide adequate resources to children and families within its borders. Even those children raised by their own parents face significant economic and health insecurity. Texas ranks in the bottom third of states (thirty-fourth of fifty) on child well-

128. See Victor O'Brien, *Newborn Found Outside KFD's Academy*, KILLEEN (TEX.) DAILY HERALD, Apr. 29 2010, <http://www.kdhnews.com/news/story.aspx?s=41140> (noting that "[d]etectives are investigating the case to determine if the "Baby Moses" law applies" following the abandonment of a child). Under the "Baby Moses" law, emergency infant care providers do not have to ascertain the identity of the parent or detain the parent, and child protective services do not have to search for the child's relatives. See TEX. FAM. CODE ANN. §262.302, 262.309 (Vernon 2009). However, as police are not emergency infant care providers as defined by the law, TEX. FAM. CODE ANN. §262.301 (Vernon 2009), they are free to investigate parents who abandon their children. See also *Criteria for a Baby Moses Case*, in TEX. DEP'T OF PUB. SAFETY, CHILD PROTECTIVE SERVICES HANDBOOK §§ 2360–62, available at http://www.dfps.state.tx.us/handbooks/CPS/Files/CPS_pg_2360.jsp (last visited Mar. 22, 2011) (identifying circumstances in which parents are ineligible for application of the law).

129. Brief in Support of Rule 60 Motion, *supra* note 18, at 39 (emphasis added).

130. See generally NAT'L COALITION FOR CHILD PROTECTION REFORM, IN SEARCH OF MIDDLE GROUND: TOWARD BETTER SOLUTIONS TO THE TEXAS CHILD WELFARE CRISIS 2005, <http://www.nccpr.org/reports/texasreport2.pdf> (discussing numerous problems with the agency to which children abandoned pursuant to the Safe Haven law would be placed).

131. Corrie MacLaggan, *Texas Struggles to Place Foster Kids*, AUSTIN AMERICAN-STATESMAN, May 7, 2007, at A1 (describing Texas' acute shortage of foster homes, adoptive families, and childcare facilities).

132. NAT'L COALITION FOR CHILD PROTECTION REFORM, *supra* note 130, at 36.

133. *Id.* at 5.

being.¹³⁴ According to the National 2009 KIDS COUNT Data Book:

[C]ompared to 2000, in 2007 more Texas children lived in economically insecure families and key indicators of infant health worsened. These data are particularly troubling because, while they represent the most updated information available, they were gathered prior to the current economic recession—meaning these indicators of child well-being will likely continue to worsen as the data catches up with our recent harsh economic realities.¹³⁵

Based on these statistics, it is clear that the State of Texas is not adequately providing for the children in its care or in the state as a whole, and that McCorvey's suggestion to the contrary is patently false.

The claim that pregnant women no longer have any burdens is a brilliant distraction from the fact that America is now one of only two industrialized nations that does not require any paid parental leave,¹³⁶ that millions of pregnant women, especially those who work part time or for small companies, lack legal protection from workplace discrimination based on pregnancy,¹³⁷ that millions of Americans—including mothers and children—have no health insurance,¹³⁸ and that maternal mortality remains a major health issue in the United States.¹³⁹ Many people, whether they consider themselves pro-life or pro-choice, suffer because they do not have access to health care and might be persuaded that comprehensive health care reform is a good idea. But the abortion debate is used to divide and distract people from the shared threats to their well-being and the concrete actions—such as single-payer, universal health care—that could dramatically improve health care for most people in the United States.¹⁴⁰

134. ANNA E. CASEY FOUND., KIDS COUNT DATA BOOK 41 (2009), http://www.aecf.org/~media/Pubs/Other/123/2009KIDSCOUNTDataBook/AEC186_2009_KCDB_FINAL%2072.pdf.

135. *National 2009 KIDS COUNT Data Book Shows Economic Security, Infant Health Major Challenges for Texas Children*, CTR. FOR PUB. POL'Y PRIORITIES (July 28, 2009), <http://www.cppp.org/research.php?aid=901>.

136. Jeff Geissler, *United States Stands Apart From Other Nations on Maternity Leave*, USA TODAY, July 26, 2005, http://www.usatoday.com/news/health/2005-07-26-maternity-leave_x.htm.

137. 42 U.S.C. § 2000e(b) (2009) (excluding employers of fewer than fifteen employees, private clubs, and the federal government from Title VII's commands). *See also* NAT'L ADVOCATES FOR PREGNANT WOMEN, *supra* note 122.

138. *See* AMNESTY INT'L, *supra* note 120, at 5–6 (discussing women's lack of health insurance); KAISER FAMILY FOUND., WOMEN'S HEALTH INSURANCE COVERAGE FACT SHEET (2009), <http://www.kff.org/womenshealth/upload/6000-08.pdf> (same).

139. AMNESTY INT'L, *supra* note 120, at 7, 10 (describing maternal mortality rates in U.S.).

140. *See, e.g.*, CAROLE JOFFE, DISPATCHES FROM THE ABORTION WARS: THE COSTS OF FANATICISM TO DOCTORS, PATIENTS, AND THE REST OF US 155 (2009) ("As always in discussions of universal health care, the coverage of contraception and abortion will be sticking points, possibly deal-breakers for some of the constituencies, such as Catholic

The claim that pregnant women no longer have any burdens is not just another crazy argument developed for the narrow purpose of overturning *Roe* and re-criminalizing abortion; it is a key part of a much larger political agenda.¹⁴¹ This larger agenda seeks to distract attention from real threats to human life—including lack of health insurance for more than 40 million people in the United States—to create the illusion of government care where none, or very little, exists. Focusing on the evils of abortion directs the anger people have about the condition of their lives *away* from the government that is failing them and *to* the people who have and support abortion.¹⁴²

D. *Winning Arguments and Adherents Without Having to Win the Case*

McCorvey's arguments did not succeed in getting *Roe* overturned, but they did deflect attention from Texas's appalling record on child and family health. They reinforced the idea that abortion, more than any other issue, poses the greatest threat to families in the United States today. They motivated a conservative circuit court judge to write and publish an unchallenged concurring opinion legitimizing junk science and the idea that women who have abortions are killing their children. They mobilized hundreds of anti-choice activists. And they reinforced and spread anti-

health institutions, that have to be brought on board.”). See generally Richard J. Meagher, *Remembering the New Right: Political Strategy and the Building of the GOP Coalition*, THE PUBLIC EYE, Summer 2009, <http://www.publiceye.org/magazine/v24n2/remembering-new-right.html> (describing how the New Right used abortion, among other issues, to build a new conservative coalition).

141. See, e.g., JOFFE, *supra* note 140, at 9–17 (describing the relationship between abortion and the religious right); ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMAN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* 241–285 (1985); FRANK SCHAEFFER, *CRAZY FOR GOD: HOW I GREW UP AS ONE OF THE ELECT, HELPED FOUND THE RELIGIOUS RIGHT, AND LIVED TO TAKE ALL (OR ALMOST ALL) OF IT BACK* 345–46 (2007) (noting that, while it was not his personal intention to achieve such results, the deliberate politicization of evangelicals after *Roe v. Wade* helped to put into power “a pro-life Republican Party that did nothing to actually care for the pregnant women and babies they said they were concerned for. . . .”); Pam Chamberlain & Jean Hardisty, *Reproducing Patriarchy: Reproductive Rights Under Siege*, PUB. EYE, Spring 2000, at 1, http://www.publiceye.org/magazine/v14n1/PE_V14_N1.pdf (“In addition to its enormous influence within the arena of reproductive rights in the US, the effort to prohibit abortion played a crucial role in the emergence of the New Right at the end of the 1970s. The New Right used the abortion issue to recruit members to its larger agenda.”)

142. See, e.g., JOFFE, *supra* note 140, at xii–xiii (“I have come to understand the abortion wars as a brilliant distraction that drains energies and resources away from other social needs, including the adequate provision of services that would allow people to have intimate and family lives they wish for.”). See also Frank Schaeffer, *Frank! As a Former Pro-Life Leader How Dare You Support Pro-Choice Senator Obama?*, HUFFINGTON POST (Aug. 17, 2008), http://www.huffingtonpost.com/frank-schaeffer/frank-as-a-former-pro-lif_b_119435.html (arguing that a single-minded focus on Obama's stance on abortion distracts from his good positions on other issues).

abortion propaganda that could eventually become the “truth” if silence is the primary response.

If we defend the right to choose abortion only through narrow legal tools, and if we focus on defending abortion rather than on defending the women who have abortions, we will not only lose the right to choose abortion but also any hope of achieving a true culture of life, one that values and includes the women who give that life.

IV.

CHANGING THE PAGE AND THE PRACTICE: THINGS THAT COULD HAVE BEEN DONE IN *MCCORVEY* (AND STILL CAN BE DONE THE NEXT TIME)

Pro-choice advocates had several avenues available to them with which to counter *McCorvey*. For instance, individuals and organizations could have written to the Dallas County District Attorney (D.A.), who declined to challenge the motion, or organized petitions or protests directed at the D.A. Such state-based action would have been an opportunity to insist that the D.A. demonstrate his commitment to the lives and health of pregnant women and to make clear that his failure to do so could have political consequences. Advocates could also have explored the D.A.’s ethical and professional obligations. Under the state’s Disciplinary Rules of Professional Conduct, prosecutors have the responsibility to see that justice is done.¹⁴³ Advocates could have argued that failing to respond at all to *McCorvey*’s case failed to ensure justice for pregnant women and was ultimately a disservice to the public. They could have used this opportunity as a way of asking if the “public” excludes pregnant women or prioritizes the asserted interests of embryos and fetuses.

Pro-choice organizations could have sought to intervene in the case on behalf of pregnant women in Texas who will always need abortion services.¹⁴⁴ They also could have written amicus briefs addressing the legal, medical, and other misinformation rampant in the *McCorvey* briefs. For example, such advocates could have filed amicus briefs or taken other steps to debunk *McCorvey*’s claim that *Roe* was decided based on outdated scientific information.¹⁴⁵ Using the original briefs in *Roe*, they could have shown that the supposedly new science is an old argument.

143. See TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 3.09, cmt.

144. See FED. R. CIV. P. 24(b)(1)(B) (“On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.”). A motion to intervene suffers the same mootness problem as *McCorvey*’s 60(b) motion. See *supra* notes 19–22 and accompanying text. Nevertheless, it would have afforded pro-choice advocates the opportunity to point out that what was at stake in Norma *McCorvey*’s litigation was what was at stake in *Jane Roe*’s: not her feelings about abortion, nor anyone else’s, but her right to determine them for herself.

145. See *supra* Part II(A).

This case could have been an amazing opportunity to address the misinformation about the consequences of abortion that seems to keep building momentum among anti-choice advocates. Pro-choice lawyers missed the opportunity to argue that differing opinions about and experiences with abortion, rather than being an argument for invasive state regulation, actually reaffirm the need for government respect and restraint when it comes to pregnant women's lives and decision-making.¹⁴⁶ They missed the opportunity to discuss the extent to which religion continues to play a role in the abortion debate, despite McCorvey's own efforts to reframe the issue as one about science.

Finally, they missed the opportunity to explore what follows from the affidavits' repeated claim that abortion is murder. Because most women who have abortions are or will be mothers, if abortion is murder, these affidavits are actually arguing that many of the women who are giving birth to and raising America's children are, in fact, murderers. In addition, the crime of murder carries significantly longer sentences than the crime of illegal abortion, and the crime of murder is equally applicable to the doctors who perform abortions and the women who have them.¹⁴⁷

Moreover, the pro-choice community missed the opportunity to build cross-issue and cross-movement alliances. A wide range of organizations—whether or not they have positions on abortion and even if many of their members oppose abortion—could have been invited and encouraged to file amicus briefs exposing the extent to which organizations that seek to re-criminalize abortion mislead, mischaracterize, and dehumanize pregnant women and fail to support the children they claim to protect.

Pro-choice groups could have worked with birthing rights groups, including midwives and doulas, to make clear that, while abortion is one aspect of pregnant women's lives, all aspects of pregnancy have the potential for significant personal and emotional impact. Together they could have filed amicus briefs addressing the feelings of anger, sorrow, loss, and trauma that women report feeling when they have been pressured

146. In this sense, the affidavits filed in the *McCorvey* case confirm the truth of Justice Blackmun's statement in *Webster v. Reproductive Health Services* that "few decisions are 'more basic to individual dignity and autonomy' or more appropriate to that 'certain private sphere of individual liberty' that the Constitution reserves from the intrusive reach of government than the right to make the uniquely personal, intimate, and self-defining decision whether to end a pregnancy." 492 U.S. 490, 548–49 (1989) (Blackmun, J., dissenting).

147. See Lynn M. Paltrow, *A Post-Roe World With Criminal Penalties Our Mothers Could Not Have Imagined*, HUFFINGTON POST (Jan. 27, 2006), http://www.huffingtonpost.com/lynn-m-paltrow/a-postroe-world-with-crim_b_14607.html (describing how changes in criminal justice system would impact the criminalization of abortion if *Roe* were overturned); Anna Quindlen, *How Much Jail Time*, NEWSWEEK, Aug. 6, 2007, at 68 ("If abortion is made a crime, then the woman who has one is a criminal.").

into having unnecessary cesarean surgery and other procedures¹⁴⁸ and when they have been denied the opportunity to make informed and voluntary decisions during labor and delivery.¹⁴⁹

Women's rights, mental health advocacy, and mothers' advocacy groups could have brought to light the extensive evidence that some women who go to term and give birth suffer from post partum depression.¹⁵⁰ In contrast to the medically unsubstantiated "post-abortion" syndrome, post-partum depression is well established but under-researched.¹⁵¹ National and local stillbirth organizations could have filed briefs addressing the women who experience miscarriages and stillbirth. These women often experience significant emotional pain yet overwhelmingly fail to get needed support from any of their health care providers.¹⁵²

Groups that address child welfare issues¹⁵³ could have filed an amicus brief exploring McCorvey's suggestion that mother's need not worry about any children they give birth to because they could be left with the state and provided for by that state. They could have discussed how the child-welfare system often punishes, rather than supports, parents who in fact

148. Cf. CAROL SAKALA & MAUREEN P. CORRY, EVIDENCE BASED MATERNITY CARE: WHAT IT IS AND WHAT WE CAN ACHIEVE 1 (2008), <http://www.childbirthconnection.org/pdfs/evidence-based-maternity-care.pdf> (discussing current high rates of interventions and procedures in pregnant women and arguing that evidence based maternity care can decrease number of interventions while improving maternal outcomes).

149. See THE BUSINESS OF BEING BORN (Barranca Productions 2008) (exploring the overuse of unnecessary medical interventions on a growing number of pregnant women in the United States today).

150. See CTNS. FOR DISEASE CONTROL AND PREVENTION, DEP'T OF HEALTH & HUMAN SERVS., MORBIDITY AND MORTALITY WEEKLY REPORT: PREVALENCE OF SELF-REPORTED POSTPARTUM DEPRESSIVE SYMPTOMS—17 STATES, 2004–2005 361 (2008) (finding that ten to fifteen percent of women experience post-partum depression within one year of giving birth). See generally Julia S. Seng, Lisa Kane Low, Mickey Sperlich, David L. Ronis & Israel Liberzon, *Prevalence, Trauma History, and Risk for Posttraumatic Stress Disorder Among Nulliparous Women in Maternity Care*, 114 OBSTETRICS & GYNECOLOGY 839 (2009) (discussing prevalence and causes of post traumatic stress disorder in pregnant women).

151. See Donna E. Stewart, Emma Robertson, Cindy-Lee Dennis & Sherry Grace, *An Evidence-Based Approach to Post-Partum Depression*, 3 WORLD PSYCHIATRY 97, 97–98 (2004) (stating that post-partum depression is a significant health problem that affects approximately thirteen percent of women but noting the dearth of evidence-based literature on the illness).

152. See LINDA LAYNE, MOTHERHOOD LOST: A FEMINIST ACCOUNT OF PREGNANCY LOSS IN AMERICA 190–234 (2003); Amber Cleveland, *Motherhood Lost*, RENSSELAER (2006), <http://www.rpi.edu/magazine/fall2006/pdf/motherhood.pdf>. See generally PARENTHOOD LOST: HEALING THE PAIN AFTER MISCARRIAGE, STILLBIRTH, AND INFANT DEATH (Michael R. Berman, ed. 2001) for a variety of perspectives on the pain and loss associated with miscarriage and stillbirth.

153. The National Coalition for Child Protection Reform (www.NCCPR.org) is one such group.

“suffer” from the stresses of parenting.¹⁵⁴ The National Safe Haven Alliance could have been encouraged to file an amicus brief addressing the real purpose and serious limitations of the “Baby Moses” laws. Groups that address adoption issues could have discussed the ways in which women who have given up children for adoption sometimes experience extreme feelings of loss, sadness, and guilt.¹⁵⁵

Public health groups could have addressed legalized abortion’s benefits to all Texans and Americans. International human rights groups could have educated the courts about the experiences of women today in countries that continue to criminalize pregnant women who have abortions. Reproductive, social, and economic justice groups could have been engaged to challenge the suggestion in the brief that poverty’s only negative consequence is to put pressure on low-income women to have abortions. Organizations such as the National Academy of Sciences and the National Center for Science Education could have been approached to see if they would address the danger of judicial decision-making based on junk science and the extent to which junk science and b.a.d. science is influencing public policy.¹⁵⁶

Religious organizations and institutions that support pregnant women’s reproductive, constitutional and human rights,¹⁵⁷ as well as organizations committed to the separation of church and state,¹⁵⁸ could have been enlisted to address the role that religion played in the litigation and the extent to which political, medical, and scientific issues should not be confused with religious beliefs.

Pro-choice organizations could also have collected the stories of pregnant women who had abortions and who were denied access to

154. See generally Chris Gottlieb, *Reflections on Judging Motherhood*, 39 U. BALT. L. REV. 371 (2010) (discussing how the child welfare system judges mothers).

155. For examples of women who experienced negative feelings as a result of giving up their children for adoption, see generally ERIC BLAU, *STORIES OF ADOPTION: LOSS AND REUNION (FAMILY & CHILDCARE)* (1993); EVELYN BURNS ROBINSON, *ADOPTION AND LOSS: THE HIDDEN GRIEF* (rev. ed. 2003); JOE SOLL & KAREN WILSON BUTERBAUGH, *ADOPTION HEALING . . . A PATH TO RECOVERY FOR MOTHERS WHO LOST CHILDREN TO ADOPTION* (2003). See also *Birthmothers: Grief, Loss, Shame & Guilt*, ADOPTION.COM, <http://birthfamily.adoption.com/birth-parents/birthmothers-grief-loss-shame-guilt.html> (last visited Apr. 26, 2011) (addressing apparently common feelings of grief, loss, shame, and guilt by some parents who have given up children for adoption). My point here is not to compare or create a hierarchy of pain among abortion, miscarriage, stillbirth, adoption, birth, and parenting, but rather to note that many women feel pain and experience hurt with regard to all possible aspects of pregnancy and its outcome. In doing so, I hope to call into question the suggestion that abortion is unique in “causing” women to feel badly in some way.

156. See, e.g., Chamberlain, *supra* note 96.

157. Such organizations could have included the Religious Coalition for Reproductive Choice (<http://www.rcc.org/>) and Faith Aloud (<http://www.faithaloud.org/faith/index.php>).

158. Americans United for Separation of Church and State is one such organization (<http://www.au.org/>).

abortions. Better yet, they could have organized an amicus brief and speak-outs about pregnancy in general,¹⁵⁹ making it clear that women who have abortions also have miscarriages and stillbirths and give birth under conditions that should raise significant concerns about women's dignity and health.¹⁶⁰ As many of us have since learned from the organization Exhale¹⁶¹ and their "Pro-Voice" movement,¹⁶² to the extent women have had bad, disappointing, or upsetting experiences with abortion since legalization, those who support full civil and human rights for pregnant women can be the ones to give them voice, acknowledge their pain, show them respect, and explore ways to support them. Even with limited time and resources, these groups could, at a minimum, have requested to re-file past women's voices amicus briefs with motions explaining how they related to this litigation.

It is highly unlikely that even the biggest and best-funded pro-choice advocacy groups would have had the funding needed to carry out all or even most of these suggested efforts. These examples, however, indicate that there was much that could have been done that would not only have expanded the base of opposition to McCorvey's efforts, but given pro-choice and reproductive justice activists facts, arguments, and strategies needed to counter the increasingly outrageous claims being made against *Roe* and the pregnant women who sometimes have abortions.

V. CONCLUSION

The *McCorvey* case provided a legal and political road map indicating the kinds of arguments that the anti-choice movement will use again and again in their relentless effort to deprive pregnant women of their civil and human rights. They have made abortion's allegedly harmful consequences

159. See, e.g., *Our Stories*, Nat'l Advocates for Pregnant Women, <http://advocatesforpregnantwomen.org/mystory/> (last visited Apr. 26, 2010) (suggesting a prototype for this kind of pregnancy-comprehensive story-telling and speaking out).

160. See REAL REASON, TONE, VISIBILITY, AND SCOPE IN PRO-CHOICE ADVOCACY CONCEPTIONS OF PREGNANCY AND ABORTION, PART II: STRATEGIC ROADMAP, PREPARED FOR THE REPRODUCTIVE HEALTH TECHNOLOGIES PROJECT 28 (2010) ("Re-integrating abortion with other common pregnancy outcomes will benefit everyone involved, not only advocates for abortion rights.").

161. See *History*, EXHALE, <http://www.4exhale.org/about.php> (last visited Feb. 24, 2010).

162. The "Pro-Voice" framework seeks to ensure that each person's unique experience with abortion is respected, supported, and free from stigma. See generally ASPEN BAKER & CAROLINA DE ROBERTIS, PRO-VOICE: A FRAMEWORK FOR COMMUNICATING PERSONAL EXPERIENCES WITH ABORTION (2005), http://advocatesforpregnantwomen.org/Pro-Voice_A_Framework.pdf; EYAL RABINOVITCH, EXHALE. CAN LISTENING TO WOMEN WHO HAVE HAD ABORTIONS BRING PEACE TO THE ABORTION WARS (2010), <http://exhaleisprovoice.files.wordpress.com/2010/05/exhalepeacepaperbye-rabinovitch5-3-10.pdf>.

to the women who have them a major new frame for their efforts to overturn *Roe* and legally segregate the fetus from the pregnant woman. They have increasingly used “new” science and junk science to cloak political agendas and religious ideology. And they have made abortion a convenient scapegoat for the emotional, economic, and social insecurity so many women and families feel today. As one pro-life magazine writing about the *McCorvey* case said,

Norma McCorvey’s new lawsuit never had a chance. But perhaps she’s done her new cause a great service in helping to expose the truth. Maybe, just maybe, Judge Jones’s plaintive cry is one step in a long battle to undo the mess that McCorvey and her friends once made back in the day she was otherwise known as Jane Roe.¹⁶³

It is my contention that, by taking anti-choice arguments seriously, by thinking less like traditional lawyers, by responding consistently and creatively, and by building cross-movement alliances, we could expose the truth about *Roe*’s importance to the lives, health, and human rights of all pregnant women and do the Reproductive Justice cause a great service.

163. *Judge In Norma McCorvey Case Blasts Roe v. Wade Abortion Decision*, BLOGICUS (Sept. 23, 2004), http://www.blogicus.com/archives/judge_in_norma_mccorvey_case_blasts_roe_v_wade_abortion_decision.php.