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The Struggle for Gender Equality in the Northern District of Ohio

Tracy A. Thomas

THE U.S. DISTRICT Court for the Northern District of Ohio, like many of its sister courts, was reluctantly drawn into the national debate over sex equality 1970s. The court's response mirrored the greater social response, initially showing a hostility to claims of gender discrimination that was slowly displaced by recognition and endorsement of sex equality rights. Three of the district's cases on women's rights that went to the U.S. Supreme Court, discussed in this chapter, helped navigate this shift toward gender equality.

The Northern District was goaded into action by the newly formed Women's Law Fund (WLF), one of the first nonprofit litigation organizations in the nation to bring sex discrimination claims. The WLF was led by Jane Picker, one of the first female law professors at Cleveland State University, and counseled by board member Ruth Bader Ginsburg, then head of the American Civil Liberties Union (ACLU) Women's Rights Project and later a U.S. Supreme Court justice. These leaders instigated the reforms needed through the judicial process, believing, like many social justice groups, that the courts were the best vehicles to bring about change. In 1971, the Fund's first case, *LaFleur v. Cleveland Board of Education*, challenged mandatory maternity leaves for pregnant teachers.¹ As this chapter will show, the lawyers encountered an incredulous

court and resistance from the community as they took on deeply embedded notions of the proper role of women in the workplace and family.

The community backlash continued as advocates sought to protect a woman's right to bodily autonomy and abortion. In 1973, the Supreme Court legalized abortion in *Roe v. Wade*.² The *Roe* Court recognized a fundamental privacy right to choose abortion, free from governmental interference in the first trimester, but new regulations continued to circumscribe abortion. Two major abortion regulation cases came before the Northern District on their way to the Supreme Court: *Akron Center for Reproductive Health v. City of Akron* and *Akron Center for Reproductive Health v. Rosen*.³ The Northern District wrestled with the legality of highly detailed regulations designed to discourage abortion, first upholding them in part but later invalidating the laws. The Supreme Court overruled the lower courts in both cases. Although the district courts had carefully tried to fit the cases within constitutional parameters, they had not predicted the Supreme Court's changing standards.

These three cases from Ohio together offer a snapshot of the larger societal change for women's rights. The nascent women's movement in the courts proceeded initially along dual fronts of employment and abortion. The Northern District cases show the tensions and commonalities between these approaches and exemplify the development of broad-scale gender litigation across the nation.

A Reluctant Agent of Change

In April 1971, the Northern District of Ohio was confronted with one of its earliest cases of sex discrimination. In *LaFleur v. Cleveland Board of Education*, Jo Carol LaFleur, a junior high teacher at an all-black inner-city school in Cleveland, challenged the board's policy of requiring unpaid maternity leave for all married female teachers who were more than four months pregnant. The rule also prohibited a teacher from returning to her job prior to the first school term after her child was three months old, and it did not guarantee her a position, but only a priority for any vacancy. These maternity policies were part of the long history of discrimination by schools against women, which forced married and then pregnant women to resign their jobs.⁴

The Cleveland maternity leave policy enacted in 1952 was passed because male administrators thought that it was inappropriate for schoolchildren to see

a pregnant woman and confront the obvious implications of sexuality. As testimony would show, the policy was motivated by school officials' desire to save a noticeably pregnant woman from embarrassment in the form of giggling schoolchildren and their comments such as "my teacher swallowed a watermelon," and to protect students from the sight of a conspicuously pregnant woman.⁵ But the board rationalized its policy during the *LaFleur* litigation as being important to protecting the health of the woman and baby and to providing continuity of instruction for the children. The school superintendent who drafted the original regulation believed that women should stay home with their children after giving birth: "I am a strong believer that young children ought to have the mother there to take tender care of the babies." Many of America's problems, he suggested, stemmed from working mothers who neglected their infants.⁶

LaFleur thought the policy was "archaic and silly" and refused to quit her job. She believed that since her baby was due in July, leaving at the end of the semester better served continuity of instruction rather than leaving abruptly in mid-March as the principal insisted. (LaFleur had refused to tell the principal her due date, so he was guessing as to the four-month point.) Furthermore, students who were pregnant were allowed to attend school throughout their pregnancies, and LaFleur taught some of these pregnant students in a transition class for girls who were at risk for dropping out of school. The idealistic LaFleur had wanted to teach these students out of her emerging sense of social justice, utilizing the specialized training she received in "ghetto teaching" in a master of teaching program she completed at John Carroll University. She thought that she could serve as a good role model for her students, being a married woman who was taking care of herself and her baby during pregnancy. The principal disagreed, and tempers flared as he forced LaFleur out by completing the leave forms for her.⁷

If was difficult for LaFleur to find a lawyer to take her case. She filed a grievance with the teacher's union, but the union representative told her to "just go home and have your baby." She tried the Cleveland branch of the ACLU, but it turned down her case, saying it was "a loser." The organization was instead focusing its litigation efforts on cases for male students challenging school bans on beards as a denial of fundamental rights.⁸ Desperate, LaFleur called the library at the *Cleveland Plain Dealer* looking for the name of a "women's lib" group. The newspaper librarian gave her several numbers, including that for the Women's Equity Action League (WEAL), through which she reached volunteer attorney Jane Picker.⁹

WEAL was founded in Cleveland in 1968 and later headquartered in Washington, D.C., until it disbanded in 1989. It was formed as a small spin-off from the National Organization of Women (NOW) by more conservative feminists wishing to avoid issues of abortion and sexuality. Its founder, Dr. Elizabeth Boyer, explained: "There's a great difference between the women's liberation movement and the women's rights movement which WEAL represents."¹⁰ WEAL believed that the abortion issue would discredit the emerging feminist movement and "feminist respectability." Instead, the group focused its agenda on the advancement of opportunities for women in education and employment, including monitoring implementation and enforcement of Title IX of the 1972 Education Act Amendments regarding equal opportunity for women in education and sports.¹¹

Picker became a WEAL volunteer attorney when she moved to Cleveland in the fall of 1970. A Yale Law School graduate, she relocated to Cleveland when her husband, Sidney, was hired as a visiting professor at Case Western Reserve School of Law. When Sidney was offered a permanent position in December 1970, Picker began to look for a job but found it extraordinarily difficult to find a firm willing to hire a woman. Such resistance led her to conclude that Cleveland was "the most conservative city" she had ever seen. She had been raised in the East, lived abroad in Bangkok and Australia, and worked in Washington, D.C., and never before had she been aware of being discriminated against as a woman as she was in Cleveland. Squire, Sanders & Dempsey eventually hired her as the firm's first female lawyer to work as an attorney. (Two other female lawyers worked at the firm, one as a law librarian and one as a secretary.) However, the firm denied her the opportunity to litigate cases as she desired and instead relegated her to "public law" and backroom research. When the call came from LaFleur in early 1971, Picker was conflicted out of the case because the firm and her partner Charles Clarke represented the defendant, the Cleveland School Board.

Another WEAL volunteer, Carol Agin, tried the case. But Picker handled all of the research and wrote the briefs. It was her idea to plead the case under 42 U.S.C. § 1983 as a federal claim for constitutional violations of civil rights. Picker had been sent to the Cleveland law library on an assignment from the firm. While there, she began flipping through the federal employment reporters and read the many cases of successful race discrimination litigation under section 1983. She thought that the same approach should work for sex, and she used the general contours of the Fourteenth Amendment to frame the legal issues in *LaFleur*.¹²

The case was assigned to Judge James Connell, a crusty and conservative seventy-three-year-old former prosecutor who “was very unfriendly to the case.” He was “very old school” and “believed a woman’s place was in the home, and therefore, certainly, a pregnant woman’s place was in the home.” Judge Connell called a pretrial hearing immediately after the papers in the case were filed, just weeks after LaFleur was forced out of her job. He greeted the counsel for the school board, Charles Clarke, in a welcoming and gentlemanly manner. He then turned to Carol Agin and said, “Young woman, why do you waste the federal court’s time with such frivolous matters?” Concerned that the court’s apparent bias would prejudice the plaintiff, Picker asked her neighbor, Case Western law professor Lewis Katz, to serve as co-counsel in the case. As Katz explained, “You have to understand. Women were treated very shabbily in and by the profession at that time, and for some years after.”¹³ Indeed, it would be twenty years before judicial task forces on gender fairness would denounce this type of gender bias in the courts.¹⁴

The two-day hearing in the *LaFleur* case was, according to Katz, “extremely unpleasant.” Judge Connell clearly thought this case was ridiculous, and he directed his wrath toward the plaintiffs, sustaining objections that had not been made and rephrasing many of attorney Agin’s questions. Meanwhile, a second plaintiff had joined the case—Ann Nelson, the wife of one of Katz’s law students. The student had come to Katz at midsemester in need of a scholarship when his pregnant wife lost her job as a Cleveland junior high school teacher. Teachers in their first year of teaching, as Ann Nelson was, were terminated if they became pregnant, rather than given leave and the opportunity to return.

Plaintiffs’ counsel worked to debunk the proffered medical evidence that there was a risk to the woman and baby if the mother worked during pregnancy. Their own medical expert, Sarah Marcus, was a feisty, eighty-year-old obstetrician who mocked the school district’s assumptions about women’s frailty. She noted that most women engaged in strenuous work at home: “There is nothing that the teacher does as a teacher that is any more strenuous than what a pregnant mother does with housework; and her attentions to the other children, if she has any, are also strenuous.”¹⁵ Katz tried to cross-examine the defense’s medical expert despite the judge’s interruptions—Judge Connell believed he had a good understanding of the medical science, having grown up as the son of an Akron obstetrician—and Katz did get the defense expert to admit that work did not negatively impact a woman’s pregnancy, a point that would be central on appeal. Defense counsel focused on the disabilities of the pregnant woman.

He asked LaFleur whether this was her first baby, to which the seven-month-pregnant woman responded, “Yes.” Later, she realized that she would have answered differently had he asked her if this was her first pregnancy; she had been pregnant before but miscarried early while she was teaching first grade. That answer might have fueled the misconception that teaching was harmful to the baby.¹⁶

At the end of the trial, plaintiffs asked for an injunction to stay the board’s decisions. Judge Connell coldly responded, “You’ll get what you deserve and you don’t deserve an injunction.”¹⁷ The court denied their request for preliminary and permanent injunctive relief, finding the school board policy to be reasonable and constitutionally permissible. Judge Connell determined that the mandatory maternity regulation was reasonable primarily because it minimized classroom distractions and disruptions when the “teachers suffered many indignities as a result of pregnancy which consisted of children pointing, giggling, laughing and making snide remarks causing interruption and interference with the classroom program of study.” He also found that the problem of the teacher’s health and safety was a valid concern for the school board in that “in an environment where the possibility of violence and accident exists, pregnancy greatly magnifies the probability of serious injury.”¹⁸ The plaintiffs urged the court to apply a more rigorous level of judicial scrutiny due to the fundamental nature of the interests involved. The district court, however, relied on the 1908 Supreme Court case of *Muller v. Oregon*, which upheld a maximum hours law to protect women. Judge Connell quoted: “The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence.”¹⁹

On appeal, the U.S. Court of Appeals for the Sixth Circuit reversed Judge Connell’s decision, finding the maternity rule arbitrary and unreasonable in its overbreadth. In a 2-to-1 decision, the majority found that the school board’s justifications were not reasonable and barely credible: “Basic rights such as those involved in the employment relationship cannot be made to yield to embarrassment.” In rejecting the mandatory leave rule, the Sixth Circuit relied on *Reed v. Reed*, decided after the *LaFleur* trial court decision, in which the Supreme Court held for the first time that sex was a classification deserving of heightened scrutiny under the Equal Protection Clause.²⁰

When the Supreme Court granted certiorari in the *LaFleur* case, Jane Picker took over as lead counsel. By then she had left her law firm and was one of three tenure-track female law professors at Cleveland State University. Picker created the Women's Law Fund in 1972 to finance precedent-setting litigation for women's rights.²¹ Like other litigation advocacy groups of the times modeled after the National Association for the Advancement of Colored People and its success in the school desegregation cases, the WLF existed to fund rights litigation and bring about meaningful social change through the courts. Law professor Ruth Bader Ginsburg served on the board of the WLF, and Picker reciprocated, serving on Ginsburg's board at the ACLU Women's Rights Project, also organized in 1972. Ginsburg had taken pro bono referrals for the New Jersey ACLU since the late 1960s, cases that were referred to her, she said, because "sex discrimination cases were regarded as a woman's job." She accepted the cases because of her impression that the ACLU nationally and locally was not enthusiastic about taking on women's rights cases and that women were not adequately represented on the organization's governing board. The ACLU first focused its efforts on sex discrimination in the fall of 1971 when it declared women's rights an issue of great urgency and asked all affiliates to give it high priority in funding and litigation.²² Feminist litigation began to take on a national agenda as attorneys in the sex discrimination cases shared information and coordinated efforts. As Justice Ginsburg reflected, "Progress does not occur automatically, but requires a concerted effort to change habitual modes of thinking and action."²³ Picker agreed: "It was no simple evolution. We made the change that happened."²⁴

The WLF was initially funded by generous grants from the Ford Foundation. Spurred by tenacious female staff members, Ford was the earliest philanthropy to commit to the women's movement.²⁵ The foundation's first feminist pilot project was the *LaFleur* case. Ford began negotiations for a litigation grant with Jane Picker as a representative of WEAL. When Picker's WEAL colleagues objected to litigating a case dealing with pregnancy discrimination, she left the organization, taking with her Ford's money for a two-year start-up grant for the WLF. But in 1984, Ford's WLF funding ended: in the 1980s, a change in leadership at Ford shifted its emphasis to issues affecting women of color and poor and working-class women.²⁶ Picker turned elsewhere for financial support, moving her organization to the Cleveland-Marshall College of Law, where she established a sex discrimination clinic staffed by students and funded primarily by attorney fee awards.²⁷

The *LaFleur* case was the WLF's first and perhaps biggest case. Picker argued the case before the U.S. Supreme Court in January 1974 in what was her first argument of any kind before a court. Amicus briefs flowed in on both sides. Delta Air Lines, which fired pregnant stewardesses, supported the school board. The Nixon administration, in the heat of the Watergate cover-up, sided with the teachers. Picker's sense was that the Court was not taking this case seriously. Just before the argument, she saw the justices passing around a journal article called "Love's Labors Lost: New Conceptions of Maternity Leaves," and she watched them chuckle like schoolboys.²⁸ She began her argument more angry than nervous. The first question from Justice Harry Blackmun asked her whether she really saw any difference between a man losing his job because he refused to shave his beard and a woman losing her job because she was pregnant. The tall and imposing Picker put her hands on her hips and said that such distinctions were "getting into ludicrous questions" and that analogies between the beard cases and the pregnancy cases were "indeed ludicrous."²⁹

The Supreme Court ruled for the women but rejected the equality analysis urged by Picker and the appellate court. Instead, the Court grounded its decision in due process privacy rights, harkening back to *Roe v. Wade* and the right to choose an abortion, decided just one year before. "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause. By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms." The opinion by Justice Potter Stewart emphasized the procedural aspects of due process in its concern over the school board's irrebuttable presumption that pregnant women were unable to continue working later in their pregnancies, rather than using a more individualized determination. The Court also rejected the board's purported reasons of continuity of instruction and maternal health, noting that the policy was originally inspired by "other, less weighty considerations" and the "outmoded taboos" of saving pregnant teachers from the embarrassment of giggling students and insulating children from the sight of a conspicuously pregnant woman.³⁰

The Court's decision to abandon the equal protection claim and all of its promise for women's rights infuriated Picker.³¹ Counsel for the school board had urged this approach, cautioning the Court in his rebuttal that the question of equal protection was "one of the most evasive issues that this Court has to determine" and that "with all due respect to my sisters at the bar, [it] does go

somewhat beyond the narrow issue in this case.”³² The case as litigated, however, clearly presented the issue of equal protection, even if the Court was unwilling to go there. Justice Blackmun’s conference papers and memorandum on *LaFleur* acknowledged that equal protection would have provided an “easier” and “cleaner” basis for the decision but indicated that none of the justices, except perhaps Justice Thurgood Marshall, thought pregnancy distinctions constituted discrimination on the basis of sex.³³ Conceptualized as due process, the case held little precedential power for the women’s movement. Picker had hoped for an equal protection decision early in the women’s rights litigation that would have accomplished the purposes of the then pending equal rights amendment (ERA), which Picker believed was redundant with the equality guarantees of the Fourteenth Amendment.³⁴ The due process decision narrowed the issue to procedural technicalities of irrebuttable presumptions and was useless in fighting other sex discrimination battles. As Jo Carol LaFleur later recounted, her case was a leading opinion in the constitutional law textbooks her class used when she was a law student in 1975—textbooks that her fellow students asked her to autograph—but it soon became just a footnote.³⁵

Soon after *LaFleur*, the Court began to address sex discrimination claims under equal protection. Congress amended Title VII of the Equal Employment Opportunity Act to apply to public schools, and the Equal Employment Opportunity Commission adopted a guideline that prohibited special maternity leave rules as sex discrimination. In 1978, Congress passed the Pregnancy Discrimination Act defining pregnancy discrimination as “sex” discrimination.³⁶ But *LaFleur* was still a milestone in the legal status of women in the workplace and had the tangible effect of quickly invalidating the many mandatory maternity leave policies nationwide that had predominated since the 1950s. As LaFleur later reflected, “Sometimes it takes a trial lawyer to vindicate a person’s rights; and . . . every now and then advocacy for one client ripples throughout the nation and aids thousands of persons, altering the cultural contours and drowning ugly stereotypes.”³⁷

In the end, LaFleur and Nelson were awarded back pay and attorneys fees. LaFleur refused the punitive reassignment position she was offered in the most violent Cleveland school and instead worked as a teacher in suburban Lakewood until she began law school in 1974, first at Cleveland State and then in Utah. She became a public defender, clinical law professor, private attorney, and mediator. Reflecting on the case, LaFleur (now Nessett-Sale) said, “I’m not quite sure why I started my case. . . . There must have been a lot of other women

who were affected by this rule. . . . The fundamental unfairness of it seemed morally wrong, not just stupid but wrong; and that men were making the decisions didn't help, because they didn't know what it was to be pregnant. It wasn't fair, and it made me angry."³⁸

She recalled how her young son, Michael, attended the Sixth Circuit argument in *LaFleur*, at her lawyer's suggestion. She and Michael rode up the elevator with an elderly man who remarked, "He's a cute little guy," and she replied, "He's a sweetheart." When she later saw that man, retired Supreme Court Justice Tom Clark, sitting on her panel, she was just glad the toddler had not been having a tantrum on the way to the courtroom. In a remembrance of the case, *LaFleur* poignantly acknowledged her children—her college-age daughter, who helped edit the article, and her son, "the baby at the center of the lawsuit, who died in his youth."³⁹

Abortion as a Woman's Right

The *LaFleur* case reached the Supreme Court at the crest of the feminist wave, in October 1973. Congress adopted the ERA in 1972, and more than half the state legislatures ratified the amendment over the next few months. Congress also passed the Equal Pay Act in 1973. And in January 1973, the Supreme Court decided *Roe v. Wade*, recognizing a woman's right to choose an abortion.

Abortion had become a women's rights issue beginning in the late 1960s. The procedure was criminalized in the late nineteenth century, altering the common-law practice that had permitted abortion up until the time of quickening at four months. Efforts to reform the criminal laws began in the 1950s and 1960s, led by public health officials concerned about the injuries and deaths resulting from illegal abortions. They sought reforms such as those suggested by an American Law Institute proposal, first made in 1957, that gave doctors greater authority to decide when "therapeutic abortions" were justifiable for the physical or mental health of the mother. Feminists then began to connect their concern with the ability of women to participate fully in the economy with the ability of women to remove the burdens of childbearing by controlling their reproductive lives. An influential speech by Betty Friedan in February 1969 expanded this feminist argument by declaring that abortion was the right of women to control their own bodies, their own lives, and their own place in society. Four states—Alaska, Hawaii, New York, and Washington—legalized abortion in 1970,

and courts in seven other states declared their criminal abortion statutes unconstitutional. In 1973, *Roe* then recognized a woman's fundamental privacy right to choose an abortion in consultation with her doctor. Immediately after *Roe*, legislatures continued to pass abortion restrictions, fueled by the growing right to life movement that expanded nationally in 1973 beyond its original sponsorship by the Catholic Church. But "the decision in *Roe v. Wade* neither started nor ended the debate over abortion."⁴⁰

Akron Center for Reproductive Health v. City of Akron involved a challenge to one of these post-*Roe* regulations. The case came at the beginning of the public debate on abortion, an issue that had previously been relegated to private discussion and underground practice. After the Supreme Court legalized abortion in *Roe*, the issue became publicly visible in the Akron, Ohio, area when three abortion clinics began operating. Women traveled to Akron from all parts of Ohio and neighboring states for legal and affordable abortions. In August 1976, two leaders in the Greater Akron Right to Life organization, Jane Hubbard and Ann Marie Segedy, proposed that the city regulate abortion. The Akron City Council did not pass the proposed ordinance on the advice of the city's legal department, which concluded the law was unconstitutional, but instead passed a narrower law requiring only that abortions after the first three months of pregnancy had to be performed in hospitals.⁴¹

A second and more comprehensive abortion regulation was then proposed in October 1977, shortly before council elections. The regulation was drafted by Alan Segedy, a lawyer for the right to life group, in consultation with two law professors at the University of Notre Dame and the University of Texas.⁴² The regulation was designed to be a model for national restrictions on abortion, and it was quickly adopted by twenty states. Similar municipal regulations had been passed (and declared unconstitutional) in Chicago and St. Louis.⁴³ The Akron regulation had seventeen provisions requiring, among other things: (1) the performance of second-trimester abortions in hospitals; (2) parental consent for minors under fifteen; (3) parental notification for minors between fifteen and eighteen; (4) informed consent for all women, pursuant to highly detailed disclosures by the physician on the risks and procedures of abortion, the possible dire physical and emotional consequences of abortion, and the fact that "the unborn child is a human life from the moment of conception"; (5) a twenty-four-hour waiting period following this counseling; and (6) the "humane disposal of the fetus."⁴⁴ Akron's chief trial attorney, Willard F. Spicer, advised the council that the law was unconstitutional, saying, "There's no question in my

mind if the ordinance was passed it would be knocked out very quickly.” He also detailed in a memo the city’s exposure to significant attorneys fees and damages if it lost the case.⁴⁵ Just a year earlier, a three-judge panel on the Northern District had struck down a similar Ohio statute requiring parental consent.⁴⁶

The proposed Akron ordinance triggered a series of heated public meetings before the City Council Health and Social Services Committee during the snowy winter of 1978, when Akron was hit by a blizzard dubbed the “storm of the century.”⁴⁷ Each hearing was packed with 200 to 300 people. NOW led the organized opposition to the ordinance. The supporters were led by a national right to life leader from Cincinnati, Dr. J. C. Willke. With his wife, Willke had self-published a book in 1971 called the *Handbook of Abortion*, which soon became a bible for the right to life movement.⁴⁸ The county health director, Dr. William Keck, testified against the bill, arguing that professional ethics and existing regulations were sufficient assurances of quality health care.⁴⁹ Religious leaders came out strongly for the ordinance: the Catholic bishop lobbied parishes; a Catholic nun and principal contacted parents from her school; and an Orthodox Jew, Marvin Weinberger, was the driving force of the local movement. Both the national Catholic Church and the Orthodox Jewish leadership had spoken out against abortion and called for active repeal of state laws that liberalized grounds for the procedure. Weinberger, a law student who was described as “overzealous,” talked about “little stunts” he used to manipulate the media and attract publicity. These included an all-night prayer vigil in frigid weather on the eve of the council vote, which was attended by 600 antiabortion protesters and was held at the Lutheran church across the street from council chambers. The vigil made the national nightly news on all three existing television channels. On the day of the vote, 150 people overflowed council chambers and the hallway to hear the final forty-five-minute debate. Thirty protestors paraded outside of chambers, wrapped in blankets against the cold.⁵⁰ In hindsight, it seems the feminist movement was surprised by and unprepared for the determination of the abortion opposition, perhaps naively assuming that *Roe* had settled the question of the availability of abortion.

The Akron abortion resolution passed by a vote of 7 to 6. The lone Republican on the council of thirteen, John Frank, voted against the regulation. Frank later said his own personal experience involving an unplanned pregnancy of his former girlfriend persuaded him that abortion was none of the council’s business. He declared, “It’s a woman decision whether or not to have a baby. Period.”⁵¹ The two women on the council split their vote. Kathleen Greissing, a nurse, voted for

it as an assurance of “good quality healthcare for women.” Elsie Reaven, who was ousted as chair of the Health and Social Services Committee in a move to shepherd the ordinance through, was outraged that the “dominant male faction in council had the arrogance to persist against all reason in burdening and possibly encumbering women.” The ordinance became law when the mayor neither signed nor vetoed the bill.⁵²

The ACLU brought suit on behalf of three abortion clinics and one doctor. No pregnant woman would agree to be a plaintiff because the trial judge, Leroy Contie, refused to allow the women (or the doctors) to proceed anonymously under pseudonyms, as was commonly done in abortion cases.⁵³ A putative plaintiff detailed her fear regarding the publicity entailed in participating in the case and the potential embarrassment, harassment, and personal attacks. The brief in support of the motion explained that “many citizens of Akron, Ohio, have had strong emotional reaction to the debate over the propriety of abortion,” and it detailed the “manifestations of social strife” that had occurred including regular public demonstrations, threatening and harassing telephone calls and letters, and one act of arson. Even plaintiffs’ lead counsel, Stephan Landsman, a professor at Cleveland-Marshall College of Law, initially turned down the case because he did not want abortion demonstrations in front of his house. His wife’s incredulous reaction to his fears—“Are you kidding me?”—convinced him to take the case.

The case proceeded as a question of women’s health. At trial, plaintiffs argued that the Akron abortion ordinance was a “straightjacket for doctors.” Defendants argued that women’s health concerns necessitated regulation. The case became a battle of the experts. Plaintiffs presented prestigious medical experts supported by the national ACLU, including one who had received a Nobel Prize in the Philosophy of Medicine. The right to life intervenors, who led the defense’s case, proffered less impressive witnesses who were easily discredited on cross-examination. This litigation of abortion as a medical issue, however, rendered the women involved invisible. As Bonnie Bolitho, a witness and counselor at one of the abortion clinics, later said, “It was pretty clear to me that the vast majority of men involved in this were not interested in the lives of individual women.”⁵⁴

Justice Blackmun’s medical analysis in *Roe*, derived from his experience as an attorney for the Mayo Clinic, seemed to call for this type of health care approach. *Roe* had framed abortion as an issue of doctors’ paternalistic care and medical science, even while offering a seemingly objective ground for legalizing

abortion. The emphasis on the medical nature of abortion affected the strategy of legislatures and litigants, including the parties in the Akron case. It was only on appeal to the Supreme Court that the Akron plaintiffs secondarily articulated the issue as the denial of women's autonomy and a portrayal of women as irrational and incapable decision makers. But "casting abortion as a medical decision shifts the focus away from women. . . . Protecting physicians' rights provided little or no foundation for according women rights. Indeed, it undermined women and their rights by denying them the respect necessary to support their right of choice."⁵⁵

Judge Contie was a conservative, Catholic Italian American who by most accounts was considered a "great judge," respected for his hard work and known as a "pretty tough character."⁵⁶ A Nixon appointee, he was the first Northern District judge to sit in Akron (nominated to fill James Connell's seat just after the *LaFleur* case), and he was later appointed by President Ronald Reagan to the U.S. Court of Appeals for the Sixth Circuit. Contie had served as law director for the city of Canton and was well known for his aggressive attack on local Mafia crime and police corruption, which led to the bombing of his home.

Judge Contie made a particular effort in the case to distance himself from the national political controversy over abortion: "Analytically, . . . this case is no different than the numerous others that come before this Court. It is the duty of this Court to determine the controversy before it based upon the requirements of the Constitution as expounded by the Supreme Court and the Court of Appeals for the Sixth Circuit. In considering the present case, this Court has attempted to do just that, nothing more and nothing less." He added a footnote, quoting Justice Felix Frankfurter: "As a member of this Court, I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. . . . It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench."⁵⁷

Judge Contie issued a compromise decision almost one year after the trial, and both sides claimed they had won. Antiabortion leaders called the ruling "terrific" and "a major victory for pro-life people," but the head of the Ohio ACLU retorted, "Another such victory and they [the right to life leaders] will be permanently undone."⁵⁸ The decision invalidated parental consent, parental notification, detailed informed consent, disposal restrictions, and clinic inspection. It upheld the twenty-four-hour waiting period, the doctor's explanation of

risks and procedures, and reporting requirements. Contie's approach was careful and measured but frustrating to the plaintiffs, who wanted him to consider the underlying issues of council's improper use of religious motives in legislating abortion. The court seemed to be searching for a practical way to split the proverbial baby, constrained to follow the commands of *Roe* yet resistant to embracing the evolving precepts of gender equity reflected in the abortion issue.⁵⁹

The Sixth Circuit, in a 2-to-1 decision, invalidated all of the provisions except for two: parental notification and the hospital requirement for second-term abortions. The appellate court criticized Judge Contie for employing a less demanding judicial review than that required by *Roe* for first-trimester restrictions. Contie had used a less exacting standard than strict scrutiny by asking whether the regulation was unduly burdensome and whether the government had a valid state interest.⁶⁰

The U.S. Supreme Court forcefully struck down the Akron law, reaffirming its abortion rights jurisprudence ten years after *Roe*.⁶¹ Justice Lewis Powell, writing for the majority in a 6-to-3 decision, found some of the provisions to be motivated by impermissible objectives: "It is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." The Court applied heightened scrutiny to invalidate the five provisions it considered, and it rejected a lower standard of inquiry that "would uphold virtually any abortion regulation under a rational-basis test." The solicitor general for the Reagan administration, Rex Lee, argued for the abandonment of the *Roe* strict scrutiny review in favor of the lesser "undue burden" standard. Justice Blackmun, author of *Roe*, asked him point-blank, "Mr. Solicitor General, are you asking that *Roe v. Wade* be overruled?" Lee responded no, saying that he was simply arguing for a standard that accommodated a deference to the legislature.⁶²

Akron's law director, Robert Pritt, also saw the case as one involving legislative power and the principle of local home rule. He had initially defended the ordinance on legal, rather than moral, grounds, but he became troubled by abortion by the end of the case. Pritt was concerned about the "tremendous amount of money" allegedly being made by the clinics, as was Councilman Ray Kapper, who said, "I talked to a lot of people over those years and a lot of them don't know what kind of money those rip-off artists were making off teen-agers."⁶³

The Supreme Court's decision in *City of Akron* was seen as an enormous symbolic victory for women's rights, with the practical effect of invalidating the abortion regulations of more than twenty-one states. Judge David Dowd, Contie's

successor on the bench, awarded the plaintiffs attorneys fees of \$368,710.⁶⁴ Councilman John Frank demanded that Willke and the national right to life organization pay the city's expenses, but they refused, politely thanking the city for its valiant antiabortion efforts.⁶⁵ The share of fees paid to Cleveland-Marshall College of Law was used for the Harry Blackmun Scholarship Fund, named for the author of the *Roe* decision. Justice Blackmun himself attended the dedication, lured to Cleveland by the promise of a much-beloved baseball game with Cleveland Hall of Fame pitcher Bob Feller.⁶⁶

The invalidation of the abortion regulation in *City of Akron*, however, remained good law for only a short time. Less than a decade later, in *Planned Parenthood v. Casey*, the Supreme Court reversed course and upheld provisions requiring informed consent, twenty-four-hour waiting periods, and parental consent.⁶⁷ Today, Ohio, like many states, has reenacted the types of abortion restrictions that were previously struck down.⁶⁸ The decision in *City of Akron* is now usually cited, if it is cited at all, for the dissent by the newly appointed Justice Sandra Day O'Connor, which showed the first inkling that the Court's abortion jurisprudence was in doubt.

A Shifting Perspective

Just three years after the Supreme Court's decision in *City of Akron*, the Northern District once again considered the legality of parental notification. In *Akron Reproductive Center v. Rosen*, the court considered a 1985 Ohio law that required a minor under the age of eighteen to notify one parent about a planned abortion.⁶⁹ Unlike the parent notification provision struck down in *City of Akron*, this law included a judicial bypass exception.

Judge Ann Aldrich was assigned the case and granted both the preliminary and the permanent injunctions invalidating the parental notification law. Considering the facial validity of the law, Aldrich found numerous constitutional defects with the bypass provision, including a lack of anonymity, no expedited process, confusing pleading forms, the clear and convincing standard, and the physician's duty to notify. Aldrich found that the law had potential for "violations of the constitutional rights of mature minors and minors for whom notification would not be in their best interests."⁷⁰ The sponsor of the bill, Representative Jerome Luebbbers of Cincinnati, said, "I fully expected that the judge would do this. She's predictable."⁷¹

Judge Aldrich was predictable because she had distinguished herself as one of the most liberal members of the court, with a strong commitment to social justice. A framed needlepoint slogan hanging on the wall of her chambers read: "Women who seek to be equal with men lack ambition." Standing over six feet tall, Aldrich was a tough woman who had been on her own from the age of eight, when her mother died in a Rhode Island hurricane. She rebuilt railroad lines in Yugoslavia after World War II, raced Siberian huskies, and married a Central Intelligence Agency (CIA) agent as her first husband. She was the only woman in her class at New York University Law School, and she recounted how she was hated by most of her classmates, who thought she was taking space from a worthy veteran and was there just to get a husband. As an attorney and law professor, she focused her efforts on racial justice. She represented the United Church of Christ and sued the Federal Communications Commission to make it easier for minorities to own radio stations in the South. Aldrich arrived in Cleveland in 1968 as the first full-time female law professor at Cleveland-Marshall, where she was later joined by WLF founders Jane Picker and Elizabeth Moody. Women still constituted less than 1 percent of law professors nationwide at the time, even though the first woman had been appointed to a tenure-track position at Berkeley in 1919.⁷² Aldrich was instrumental in founding the law school's diversity student recruitment program. She drove to Tupelo, Mississippi, seeking to find qualified future law students at the historically all-black teachers' colleges of the South. The students, among them the future Ohio appellate judge Patricia Blackmon, often came with nothing, and Professor Aldrich supported them, even inviting them to live in her home.⁷³

Aldrich was the first woman judge in the Northern District, appointed in 1980 by President Jimmy Carter. She followed the legacy of Florence Allen, the first female judge elected to the state court in Ohio in 1921 and appointed to the U.S. Court of Appeals for the Sixth Circuit in 1934. Carter made a determined effort to increase the number of women and black federal judges; he would appoint forty-one women to the bench during his tenure. Yet like most federal and state courts, the Northern District would remain less than 20 percent female for the next twenty-five years.⁷⁴ When a new judicial position was created in the Northern District, the women's rights advocates went into high gear. Advocates such as Lana Moresky from NOW worked to vet female candidates. Most of those candidates were law professors, including three from Cleveland State, as there was a lack of senior women in corporations or law firms at that time.

Once appointed to the bench, Judge Aldrich encountered turmoil and collegial difficulties on the court when she accused the chief judge of influence peddling and when she herself was accused of lying for romantic gain. The scandal that ensued temporarily diminished the dignity of Cleveland's federal bench, leading one judge to say, "I wish this were all a bad dream and we could wake up and say it's over."⁷⁵

With one woman on the court, the potential existed for litigants in gender cases to find a more receptive judicial audience. As empirical work has shown, there are significant differences in voting patterns among judges in sex discrimination cases, with male judges much less likely to decide in favor of the plaintiff.⁷⁶ One lawyer representing a defendant in an employment sex discrimination case before Judge Aldrich seemed concerned about this inclination and asked the judge to recuse herself. She refused. In *Akron II*, Aldrich showed an appreciation of the practical difficulties facing young women seeking abortions, even though she did not accept the plaintiffs' arguments completely. She found that the evidentiary standard in the bypass procedure created "an unacceptably high risk of erroneous determinations," since "the judge's decision will necessarily be based largely upon subjective standards without the benefit of any evidence other than a woman's testimony."⁷⁷ As Aldrich had suspected, many of these judicial bypass decisions turned out "to be at the whim of the judge." One judge denied a judicial exemption to a seventeen-year-old despite evidence of physical abuse by her father, another judge denied a bypass because a seventeen-year-old girl had not had enough "hard knocks," and a third judge denied the exception because the teenager refused to file a paternity suit against her partner.⁷⁸

The law took effect after the Supreme Court overruled Judge Aldrich's decision in *Ohio v. Akron Reproductive Center (Akron II)*. Though the Sixth Circuit Court of Appeals had affirmed the unconstitutionality of the statute, the Supreme Court found the judicial bypass procedure valid.⁷⁹ Justice Blackmun vigorously dissented, finding Ohio's bypass procedure to be a "tortuous maze" that deliberately placed a pattern of obstacles in the path of pregnant minors. He found the challenged provisions to be merely "poorly disguised elements of discouragement for the abortion decision."⁸⁰ Counsel for the plaintiffs, Linda Sogg, had tried to make these points at oral argument, explaining how the law "stacks the decks" against the minor. But Sogg was encumbered by a shrill voice and a lack of appreciation for the tenuousness of the abortion right among the justices. They were more persuaded by the legalistic arguments of Rita Eppler from the Ohio Attorney General's Office, who argued that the law balanced the rights of minor women against the rights and interests of their parents.⁸¹

In upholding the parental notification law, Justice Anthony Kennedy and two other justices applied a low level of judicial scrutiny, concluding that the regulation did not impose an undue burden and that it was a rational way to further the end of protecting the health of young women. This standard, suggested by Justice O'Connor's dissent in *City of Akron*, was subsequently adopted by the controlling plurality of the Court two years after *Akron II* in *Planned Parenthood v. Casey*.⁸² The *Casey* decision identified an important government interest in protecting a minor's mental health from the psychological risk that she might later regret her abortion. This mental health rationale was later extended to all women by the Court's 2007 decision in *Gonzales v. Carhart*, which upheld the federal Partial-Birth Abortion Act banning a rarely used late-term abortion procedure. The *Carhart* Court held it was important to protect adult women from the alleged mental and emotional consequences of the decision to have an abortion. Scientific studies conducted after the decision, however, concluded that the evidence did not support the claim that abortion caused mental health problems in women.⁸³ A scathing dissent by Justice Ginsburg in *Carhart* emphasized that the rationale of protecting women "reflects ancient notions about women's place in the family and under the Constitution — ideas that have long since been discredited."⁸⁴ These abortion decisions reinforced stereotypes about women's primary role as mothers and the assumed irrationality of their decision making — normative concerns of gender that reached beyond the issue of abortion.⁸⁵

THE Northern District of Ohio was drawn into the national debate over women's rights through a series of key cases that ultimately were resolved by the U.S. Supreme Court. These cases served as vehicles for meaningful social change for women, even while they also served to reinforce conventional gender norms. The cases were fueled by dedicated women advocates, parties, and judges who understood the need for social change to promote gender equality. Although the courts often operated out of a sense of the rule of law, they did address the claims of sex equality that came before them, ultimately acknowledging women's rights as they developed.

Notes

Special thanks go to Bill Rich for making important Akron connections and to Kristina Melomed for her enthusiasm and invaluable research assistance.

1. 326 F. Supp. 1208 (N.D. Ohio 1971).

2. 410 U.S. 113 (1973).
3. 479 F. Supp. 1172 (N.D. Ohio 1979); 633 F. Supp. 1123 (N.D. Ohio 1986).
4. Transcript of Oral Argument, *Cleveland School Board v. LaFleur*, October 15, 1973, at 28 (citing Amicus Brief of National Education Association); see *Greco v. Roper*, 61 N.E.2d 307 (Ohio 1945) (upholding resignation rule for married female teachers).
5. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 641 (1974).
6. Peter Irons, *The Courage of Their Convictions: 16 Americans Who Fought Their Way to the Supreme Court* (New York: Penguin Books, 1988), 307, 309–10.
7. *LaFleur*, 326 F. Supp. at 1209; Jo Carol Nessel-Sale, “From Sideline to Frontline: The Making of a Civil Rights Plaintiff—A Retrospective by the Plaintiff in *Cleveland Board of Education v. LaFleur*, a Landmark Pregnancy Discrimination Case,” *Georgetown Journal of Gender and the Law* 7 (2006): 1, 10, 12–14; Jo Carol LaFleur, “Go Home and Have Your Baby,” in Irons, *Courage of Their Convictions*, 317; Norman Milachak, “A Case Named Michael Toddles to the Supreme Court,” *Cleveland Press*, April 27, 1973.
8. See, e.g., *Gfell v. Rickelman*, 313 F.Supp. 364 (N.D. Ohio 1970), *aff’d*, 441 F.2d 444 (6th Cir. 1971) (rejecting due process claim); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970) (rejecting due process claim), *cert. denied*, 400 U.S. 850 (1970); but see *Breen v. Kahl*, 296 Supp. 702 (W.D. Wis. 1969), *aff’d*, 419 F.2d 1034, 1036 (7th Cir.) (holding that “[t]he right to wear one’s hair at any length or in any desired manner is an ingredient of personal freedom protected by” the Due Process Clause of the Fourteenth Amendment), *cert. denied*, 398 U.S. 937 (1970).
9. Nessel-Sale, “From Sideline to Frontline,” 14–16; *LaFleur*, “Go Home,” 321; Brian Williams, “Mother-to-Be Sues for Job,” *Cleveland Plain Dealer*, March 27, 1971.
10. Sue Kincaid, “WEAL Works for Women’s Opportunity,” *Cleveland Press*, September 22, 1970.
11. Barbara Flicker, *Justice and School Systems: The Role of the Courts in Education Litigation* (Philadelphia: Temple University Press, 1990), 132–25.
12. Nessel-Sale, “From Sideline to Frontline,” 16; *LaFleur*, “Go Home,” 322; Jane M. Picker, interviews by the author, February 21, 2010, and October 18, 2010; see Deborah Dinner, “Recovering the *LaFleur* Doctrine,” *Yale Journal of Law and Feminism* 22 (2010): 23–24.
13. Lewis Katz, interview by Kristina Melomed, January 29, 2010.
14. Ohio Joint Task Force on Gender Fairness: Final Report (1995). Executive Summary of Report available online at www.ohioabar.org/task_force. Full copies available for purchase from the Ohio State Bar Association.
15. Hearing Transcript, *LaFleur v. Cleveland Board of Education*, April 19, 1971, at 158, in *Women’s Law Fund Papers*, Western Reserve Historical Society, Cleveland, Ohio (hereafter cited as WLF Papers).
16. *Ibid.*; Jo Carol Nessel-Sale, interview by the author, July 16, 2010; Katz interview; “2 Pregnant Teachers Fight Ouster in Court,” *Cleveland Plain Dealer*, April 20, 1971.
17. Katz interview; *LaFleur*, “Go Home,” 322.
18. *LaFleur*, 326 F. Supp. at 1213–14.
19. 208 U.S. 412 (1908).
20. 465 F.2d 1184 (6th Cir. 1972).
21. *Women’s Law Fund* pamphlet, WLF Papers. The fund was officially incorporated in November 1972.
22. Amy Leigh Campbell, *Raising the Bar: Ruth Bader Ginsburg and the ACLU Women’s Rights Project* (Xlibris, 2004), 27.
23. Justice Ruth Bader Ginsburg, “Foreword, Report of the Special Committee on Gender of the D.C. Circuit Task Force on Gender, Race, and Ethnic Bias,” reprinted in *Georgetown Law Journal* 84 (1996): 1651.

24. Picker, February interview; Susan M. Hartmann, *The Other Feminists: Activists in the Liberal Establishment* (New Haven, Conn.: Yale University Press 1998), 82.

25. Hartmann, *Other Feminists*, 135, 162, 174. In the 1970s alone, Ford-supported organizations sponsored or filed amicus briefs in more than twenty sex discrimination cases that reached the Supreme Court.

26. *Ibid.*, 174; letter from Ford Foundation to Jane Picker, August 15, 1983, WLF Papers.

27. The WLF continued to handle employment sex discrimination cases, including charged claims against police and fire departments. See, e.g., *Malone v. City of East Cleveland*, 1978 WL 186 (N.D. Ohio 1978); *Baker v. Portage County Sheriff's Dep't*, C-75 661 (N.D. Ohio 1975); also see Jane M. Picker, "Sex Discrimination in Public Education and Local Government Employment," *Urban Lawyer* 5 (1973): 347, 355. It also handled cases of female student-athletes under the newly enacted Title IX, including the first decision in the United States allowing a girl to play football. *Clinton v. Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974). The fund dissolved in 2006, finding that its "mission had been accomplished" when it was no longer difficult for women plaintiffs to find lawyers to take their cases. Historical Sketch, WLF Papers.

28. Erica B. Grubb and Margarita C. McCoy, "Love's Labors Lost: New Conceptions of Maternity Leaves," *Harvard Civil Rights-Civil Liberties Law Review* 7 (1972): 260.

29. Picker, February interview; LaFleur, "Go Home," 325.

30. 414 U.S. at 639-42.

31. Picker, February interview.

32. Transcript of Oral Argument, *Cleveland School Board v. LaFleur*, 42.

33. Dinner, "Recovering the *LaFleur* Doctrine," 58 (quoting Harry A. Blackmun, Memorandum to the Conference, October 15, 1973, and Blackmun's notes on conference, October 19, 1973, in Harry A. Blackmun Papers, box 175, folder 1, on file with the Library of Congress, Washington, D.C.). Indeed, six months later, the Court dismissed in a footnote the contention that a pregnancy classification was discrimination on the basis of "sex." *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

34. See Jane M. Picker, "Law and the Status of Women in the United States," *Columbia Human Rights Law Review* 8 (1976-77): 311.

35. See Donna Matthews, "Avoiding Gender Equality," *Women's Rights Law Reporter* (April 1998): 140-41; LaFleur, "Go Home," 329.

36. 42 U.S.C. § 2000e(k).

37. Nessel-Sale, "From Sideline to Frontline," 1.

38. LaFleur, "Go Home," 325.

39. Nessel-Sale, "From Sideline to Frontline," 1, 21; Irons, *Courage of Their Convictions*, 317. Michael committed suicide during his freshman year of college.

40. Linda Greenhouse and Reva Siegel, *Before Roe v. Wade: Voices That Shaped the Abortion Debate before the Supreme Court's Ruling* (New York: Kaplan Publishing, 2010), xii-xiii, 3, 24, 38-40, 81, 121-25; Nancy Ford, "The Evolution of a Constitutional Right to an Abortion: Fashioned in the 1970s and Secured in the 1980s," *Journal of Legal Medicine* 4 (1983): 271.

41. "Akron Council to Get 'Tough' Abortion Plan," *Akron Beacon Journal*, October 17, 1977.

42. William Hershey, "More Hearings Planned on Abortion," *Akron Beacon Journal*, December 21, 1977.

43. See *Friendship Medical Center, Ltd. v. Chicago Bd. of Health*, 367 F. Supp. 597, 608-21 (N.D. Ill. 1973); *Ward v. Poelker*, 495 F.2d 1349, 1352 (8th Cir. 1974).

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51. John Frank, interview by the author, June 21, 2010.
52. David Brinkley, *NBC News*, February 28, 1978; William Hershey, "Council Passes Abortion Control Bill; Opponents Vow Challenge in Court," *Akron Beacon Journal*, February 28, 1978; Hershey, "Abortion Debate Centers on Consent Provisions," *Akron Beacon Journal*, January 26, 1978; Hershey, "More Hearings Planned on Abortion," *Akron Beacon Journal*, December 21, 1977; Editorial, "Fast Ruling on Ordinance Would Serve Community," *Akron Beacon Journal*, March 9, 1978; Editorial, "The Abortion Issue . . . in Akron," *Washington Post*, September 11, 1982.
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60. 651 F.2d 1198, 1203–4 (6th Cir. 1981); see also 651 F.2d at 1215 (Kennedy, J., dissenting).
61. 462 U.S. 416 (1983).
62. 462 U.S. 420, 444; Transcript of Oral Argument, *City of Akron v. Akron Center for Reproductive Health*, November 30, 1982; Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* (New York: Alfred A. Knopf, 1987), 105–663. Robert Pritt, interview by Tracy Thomas, June 18, 2010.
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