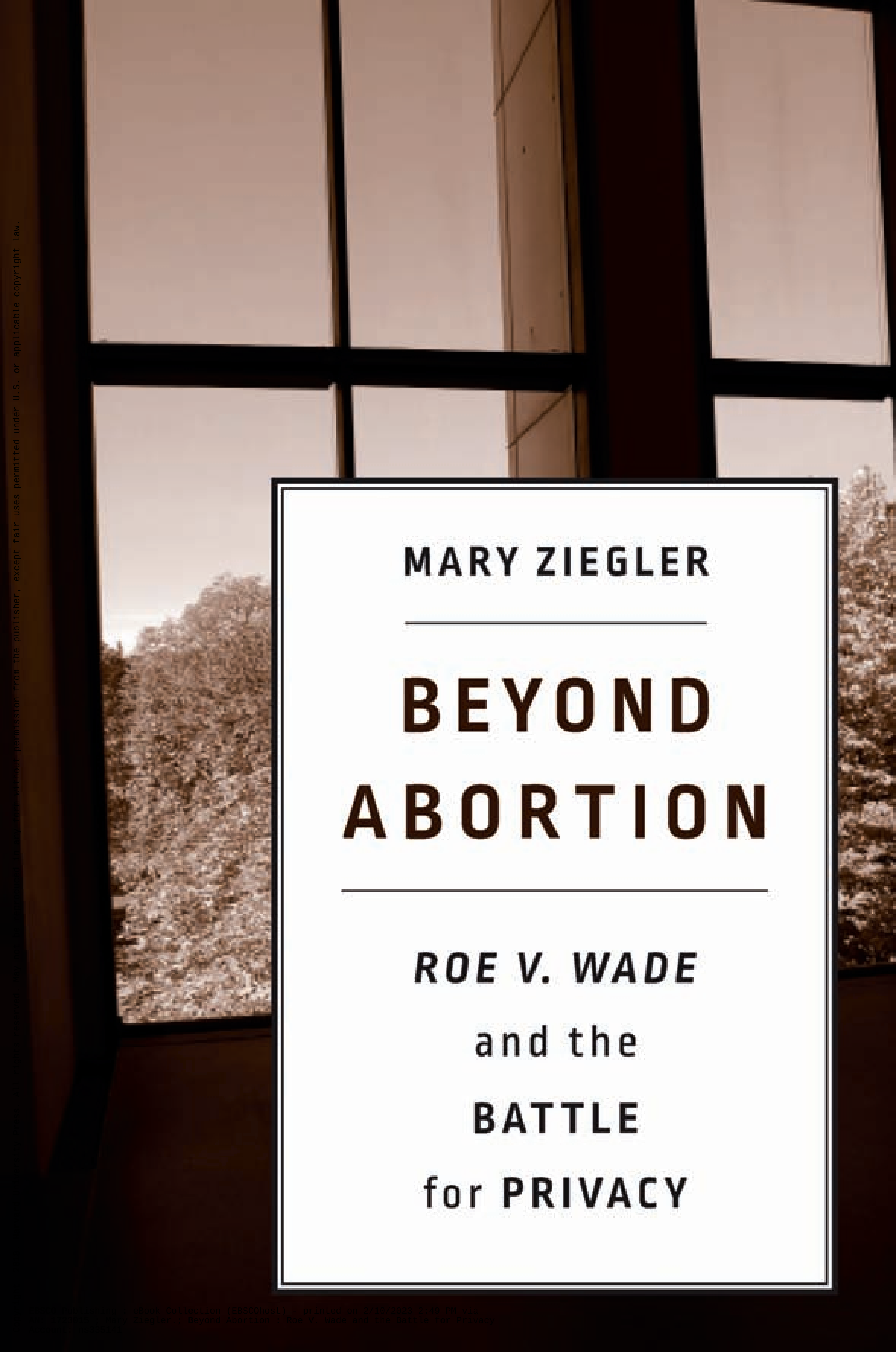

MARY ZIEGLER

BEYOND ABORTION

ROE V. WADE and the BATTLE for PRIVACY

Beyond Abortion

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Roe v. Wade and the Battle for Privacy

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For Dan and Layla

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Beyond Abortion

Introduction

Roe v. Wade casts a long shadow over American culture and politics. On the fortieth anniversary of the Supreme Court's 1973 decision, Planned Parenthood handed out pink signs celebrating the right to choose. Some pro-lifers marked the anniversary by measuring the 57 million lives they believe were lost because of the Court's decision. Although decades of Supreme Court nomination hearings and protests have made these understandings instantly familiar, they represent one point in a longer story of encounters with *Roe*. Many social movements not involved in abortion politics have drawn from *Roe*'s power, reasoned from *Roe*'s idea of privacy, and projected deeply different meanings onto the Court's decision.

Of course, *Roe* did not cause any activist to adopt a different strategy. And when invoking *Roe,* movement members have articulated ideas never spelled out in the Supreme Court's opinion. At times, activists pointing to *Roe* referred to abortion rights. Other advocates borrowed from understandings of the decision forged in popular politics, equating *Roe* with a right to choose or a right to control one's body. Some advocates spoke of these concepts without ever mentioning *Roe* directly. The book explores these reinterpretations as

well as those based on Court's original holding. The decision's legacy includes all that activists made it mean, not just what the Court said.

Movements' uses of *Roe* (and popular reinterpretations of it) reveal the importance of privacy arguments to a variety of movements in the 1970s and beyond. In invoking *Roe,* activists helped to reorder the law and politics of intimate relationships, medical authority, mental illness, and death and dying. In the 1970s, sex workers, gay and lesbian advocates, civil libertarians, and feminists pointed to *Roe* in their efforts to win new protections for sexual activity. Alternative medical practitioners interested in choice arguments used *Roe* to argue for a more deregulated, inclusive medical practice, while civil libertarians and patients' rights organizations demanded new protections for medical records.

Some of these debates intersected with related constitutional questions, like those involving any patient's right to refuse unwanted medical treatment. Others, like those involving the right to die, tied in to conversations about the rights of the disabled in other areas, including sex and reproduction. The 1970s saw Americans debate and reconfigure the terms of political, medical, and sexual citizenship by relying on the right to privacy, sometimes applying *Roe* to questions that were partly or wholly removed from the issue of whether abortion should be legal. The stories of the remarkable range of Americans who sought to apply *Roe* far beyond the abortion wars show how unfamiliar ideas about the right to privacy promised to change American life and law.

Over the course of the 1980s and 1990s, however, the broad use of *Roe* by social movements largely gave way to more familiar interpretations tied exclusively to reproductive health and even judicial activism. This transition was neither straightforward nor complete, and some social movements, including advocates for the right to die, persisted in projecting novel meanings onto the decision. Nevertheless, after 1980, when political-party realignment had changed the course of the abortion wars, invoking *Roe* helped activists solidify an alliance with the Democratic Party and the grassroots movements then supporting it.

By the mid-1990s, arguments centered on the decision did not always appeal even to the pro-choice activists most naturally inclined to advance them. Throughout the decade, Republican leaders and pro-life activists worked to popularize a very different interpretation of *Roe* focused on judicial overreach While concern about *Roe* and judicial review had garnered attention in the

academy, by the end of the 1980s, *Roe* and the right to privacy it recognized had for many become symbols of the problems with a powerful judiciary. As more Americans identified *Roe* as a prime example of judicial activism, even those most likely to invoke the right to privacy sometimes sought out other arguments.

The social movements studied here were not the only ones relying on the right to privacy in the 1970s. This book focuses on those centered on sexual politics, medical consumer rights, informational privacy, mental health, and death and dying because they wove claims about *Roe* into a broader argumentative agenda. These understandings of *Roe* and concepts identified with it shed unique light on how a diverse cast of characters tried to reinvent the right to privacy.

Activists projected widely different meanings onto the decision, sometimes referring to the Supreme Court's holding, sometimes referring to abortion rights more broadly, and sometimes referring to ideas about individual autonomy only hinted at by the Court in 1973. Some of this imprecision on advocates' part was certainly accidental: many of those who invoked *Roe* alongside other privacy arguments had no legal training or interest in the niceties of constitutional doctrine. But at other times the imprecision was tactical. *Roe* touched on the related (but distinct) concepts of privacy and choice. Invoking the decision allowed movements to gesture to both ideas and to elide the differences between the two (and between *Roe* and either privacy *or* choice) when it was convenient to do so. Support for broader privacy protections seemed widespread in the years immediately after *Roe,* and some movements tried to identify their causes with a right that already enjoyed considerable approval. But claiming a right to choose could mean something more radical, suggesting that people thought to be incapable of making decisions deserved respect or even equal treatment. By using *Roe* or arguments related to it, activists could tap into the popularity of privacy demands while asking for something more.

At first, the appeal of *Roe* seems counterintuitive. Law professors with sharply different political preferences, including those sympathetic to legal abortion, began attacking the methodology of the Court's opinion almost as soon as it was decided. The pro-life movement also worked throughout the 1970s to destabilize the outcome reached in *Roe.* There were certainly other Supreme Court decisions available to movements intrigued by the right to

privacy. After all, the Supreme Court had described privacy expansively in two recent decisions, *Griswold v. Connecticut* (1965) and *Eisenstadt v. Baird* (1972). Both *Griswold* and *Eisenstadt* dealt with contraception, an issue far less controversial by the 1970s than the abortion procedure at the center of *Roe*.

Nevertheless, the Court's 1973 decision was not only more recent and widely known but also more sweeping, recognizing a right that trumped seemingly important state interests in protecting life and health. Moreover, unlike the Court's other recent privacy decisions, *Roe* tied privacy to bolder ideas of self-determination. *Roe* also hinted that constitutional autonomy might intersect with women's interests in equal treatment. For this reason, *Roe* proved to be a potent symbol regardless of any controversy surrounding abortion or the soundness of the Court's original opinion.

The book does not take issue with the widely held conclusion that *Roe* as a constitutional decision was flawed. Instead, the history traced in *Beyond Abortion* shows that the decision proved useful to a variety of social movements notwithstanding any problems with the Court's reasoning. The decision could be a valuable weapon partly because not everyone immediately paid attention to academic criticisms of *Roe*'s merits. Grassroots activists did not always take an interest in the attacks on the intellectual foundation of *Roe* that had circulated widely in the academy. Lawyers sometimes tried to extend principles that they believed the Court had recognized. The political popularization of arguments identifying *Roe* with judicial activism came later and for reasons beyond the 1973 decision itself.

The other reason that activists and lawyers did not initially shy away from using *Roe* is that movement members never limited their arguments to the text of the Court's decision. The 1973 decision created valuable raw material that different advocates used in formulating their demands. Often, movement members relied on popular reinterpretations of the 1973 decision, including those centered on a right to choose. At other times, advocates made *Roe* stand for something not mentioned in the abortion debate at all. Some features of the decision—its political visibility, its focus on privacy and autonomy, even its application to a medical matter—made it a potent source of inspiration for activists seeking to redefine the Court's decision.

Why do these efforts to redefine the *Roe* decision matter? First, the experiences of those using the decision add an important chapter to the history of the 1970s. Many of the defining features of our times—the nation's deeply

partisan politics, unequal distribution of wealth, and growing commitment to certain forms of equality and identity politics—cannot be understood without investigating those years. Those using *Roe* to redefine varied rights to privacy offer important insight into what made the decade so significant. The ideas of choice, autonomy, and privacy identified with *Roe* captured what Thomas Borstelmann calls the rise of "a purified form of individualism," defined by free-market capitalism and interest in individual rights to equal treatment and self-control.[1] But the 1970s witnessed more than the ascendancy of the individualism Borstelmann describes.

Roe is not a protagonist in the story of privacy politics in the 1970s. This book instead uses popular ideas about the opinion to understand how activists rethought individualism and the right to privacy. Some movements united the language of choice and privacy to demand respect for new groups, including children, the poor, the mentally ill, and the disabled. Others tied privacy to the right to choose in an effort to request government assistance for the poor or protection against private acts of violence and discrimination. Right-wing groups glossed over the differences between choice and privacy to attack government involvement in consumer protection, social welfare, or racial justice.

Studying those who invoked the *Roe* decision reveals how the culture of small government, self-determination, and formal equality that emerged from the 1970s was far from preordained. While many in the decade embraced values identified with the *Roe* decision, the political, economic, and social ramifications of those ideas were far from clear. For much of the decade, Americans did not yet identify the right to privacy with either the Democratic Party or the political Left. Emphasis on the right to privacy did not automatically mean that the government would have fewer constitutional or moral obligations to assist the poor, the disabled, or other vulnerable populations. Nor did the right to privacy inevitably cover only acts performed behind closed doors. Indeed, some activists invoked constitutional privacy in arguing for tolerance of relationships and acts that took place in the public eye. The book illuminates the political, economic, and social forces that made some ideas about the right to privacy more compelling than others by the decade's end.

Telling the stories of those who repurposed *Roe* further helps make sense of ongoing scholarly debate about the value of constitutional arguments based

on privacy. Feminist scholars, historians, and legal commentators have exposed the dark side of the privacy reasoning relied on by the *Roe* Court, assigning it the blame for some of the shortcomings of feminist jurisprudence, the triumph of a narrow conception of rights, the persistence of medical paternalism, and the decline of the welfare-rights movement. However, recent scholarship has added nuance to these criticisms. Legal theorists have demonstrated the potential of privacy reasoning for social-change movements, exploring its ability to draw out constitutional interests in equality and dignity. Historians have uncovered the radical uses to which related arguments have been put. Taken together, existing studies offer contradictory evidence about whether privacy claims can ever help those seeking to change the larger society. Tracing disparate efforts to engage *Roe* helps to bridge the gap between these conflicting analyses.[2]

The book also offers fresh insights into a signature form of constitutional politics—one centered on key judicial decisions rather than on the text of the Constitution. Other scholars have examined movement use of judicial decisions, studying subjects including the reworking of Supreme Court opinions on segregation, sex discrimination, and the pull of precedent for members of Congress debating constitutional norms. These accounts focus on a single movement or governing body. By studying the many movements that used the *Roe* decision, this book offers a broader overview of the costs and benefits of this constitutional strategy. The history documented in *Beyond Abortion* shows that social movements invoking a judicial decision do interpretive work that is just as creative as those relying on the written text of the Constitution. The movements invoking *Roe* almost never felt bound by what the Court had said in 1973. Instead, when making *Roe* a weapon, advocates projected meanings of their own onto the decision.[3]

Finally, by tracing efforts to remake *Roe* and their outcomes, this book provides a crucial reevaluation of the legacy of the 1973 decision. It reveals that *Roe* proved unusually attractive as a symbol for movements with political orientations and ambitions. *Roe* certainly did not transform these movements' strategies, but it became an important part of many organizations' argumentative agendas. Activists used elements of the decision to forge their own interpretations of *Roe* or of the right to privacy more broadly. Understanding the legacy of the *Roe* opinion requires analysis not only of the aftermath of the 1973 decision but also of the value that arguments about *Roe* created for

movements and ordinary Americans debating the meaning of the Constitution. The book thus departs from scholarship that primarily traces the impact of the decision on the abortion wars, as well as broader debates about the role of the judiciary, gender, and women's rights. The history of *Roe*'s legacy encompasses a wide range of movements mostly or entirely disconnected from abortion that wove the decision into their demands for social change.

This book uncovers these disparate efforts to engage *Roe* by surveying the strategy papers, meeting minutes, and correspondence of the many social movements that have made arguments about *Roe*. While focusing on the experiences of those who imagined a different culture of privacy emerging from the 1970s, *Beyond Abortion* explores how this social-movement history shaped and reflected changing ideas about *Roe* adopted by the media, elected officials, and scholars. Writing this history required the collection and deciphering of interpretations of the decision offered by patients, abortion providers, religious leaders, sex workers, philanthropists, and feminists. Much of this archival material is housed at major universities and in the private papers of those involved in core political struggles. The book also draws on original oral histories collected from activists, health care providers, lawyers, and bureaucrats who used the decision for their own ends.

The risks of using oral histories are well known. Decades have passed since many of the events documented in these pages took place, and many forget what they may have remembered incompletely to begin with. Public history—ideas about key events developed by public institutions and the media—may distort individuals' ideas about what happened and how particular people contributed to it. By working closely with other members of a tight-knit group, such as the social movements studied here, individuals may also create different historical narratives. This process may be deliberate—part of an effort to legitimize a current course of action or define a coherent identity. In other instances, shared commitments may inadvertently alter an individual's recollections. For this reason, the book does not use oral histories to explain key events or broader historical currents. Instead, it relies on oral histories to illuminate the personal background or experiences of individual activists whose voices are often lost in the generalizations made about movements that take up divisive causes. Using advocates' own words in a limited and careful way helps to showcase the political, economic, and ideological diversity of those who created a rich culture of privacy in the period.

The book proceeds roughly chronologically through thematically oriented chapters. Chapter 1 briefly sets out the details of the *Roe* decision and the history of ideas about privacy in the lead-up to and aftermath of the decision. As this chapter shows, the *Roe* decision almost immediately drew harsh criticism from legal academics. However, for almost a decade, scholarly attacks on *Roe* did not consistently reverberate outside the academy. Indeed, as the book later suggests, it was not until Republican politicians and prolife activists set out to make *Roe* a popular symbol of judicial dysfunction that criticisms of the Court caught on with a broader political audience. By contrast, in the 1970s, movement lawyers seeking the recognition of new rights saw *Roe* as one of the most promising available precedents because of the unusual methodology that stoked skepticism among law professors.

Chapter 2 looks at the first of these campaigns, foregrounding efforts to make the right to privacy synonymous with sexual freedom. Inspiring a network of attorneys across the country, the ACLU Sexual Privacy Project challenged sex laws in the courts. In lobbying against existing morals laws, nonlawyers, including proponents of gay and lesbian rights, sex workers, and civil libertarians, used *Roe*'s right to privacy as one of the central arguments for challenging the status quo.

With an understanding of these movements' use of *Roe,* we can see how activists developed unfamiliar ideas about the right to privacy or choice. Feminists pointed to the right to privacy in asking for government protection from individual acts of sexual violence. Gay and lesbian activists used privacy to demand tolerance for the relationships and political activity of those who were openly gay. By describing a single right to sexual privacy, movements hoped to smooth over disagreements about reform priorities, build cohesive coalitions, and create support for reform when certain sexual practices still generated controversy.

Many groups moved away from this use of the right to privacy over the course of the early 1980s. While different advocates embraced what they saw as liberty for consenting adults acting in private, it soon became clear that erstwhile allies disagreed about the meaning of consent and the boundaries of private conduct. With the rise of new voices in the women's movement, the push to reform laws on marital rape and pornography convinced many feminists that sexual liberty would excuse violence against women. Partly for strategic reasons, a newly professionalized gay-rights movement empha-

sized discrimination rather than broad demands for sexual liberty. The mobilization of the New Right and the Religious Right strengthened the view that members of the traditional family, rather than sexual dissenters, were the true victims. An apparent consensus about the importance of privacy in sexual matters concealed lasting disagreement about the meaning of both choice and privacy and the relationship between them.

Chapter 3 tells the story of those who used *Roe* and other privacy arguments in the campaign to reform the treatment of mental illness in the 1970s. Starting in the 1960s, lawyers in organizations like the ACLU championed a right to treatment, arguing that Americans could no longer be civilly committed without receiving effective care. In the early 1970s, former mental patients formed independent organizations. Borrowing from new attacks on psychiatry made by sociologists and psychologists, patient groups like the Mental Patient Liberation Front and the Network Against Psychiatric Assault argued that the right to privacy applied to patients' ability to refuse unwanted treatment.

For attorneys in the emerging mental health bar, *Roe* and its progeny seemed to be a logical source of support for what was at the time a novel legal demand. However, lay activists also used the right to choose in lobbying and media outreach. Organizers hoped to popularize novel ideas of privacy. Patients suggested that if Americans attached new value to autonomy, lawmakers had given too little weight to those dependent on others for support, including the mentally ill, the poor, and juveniles. Moreover, patients rejected an interpretation of privacy centered on freedom from state interference. Activists suggested that to truly have a right to refuse treatment, patients required government funding for alternative care, job training, and housing.

Working with attorneys in the Mental Health Law Project, anti-psychiatry activists scored some victories. But in 1979, when the Supreme Court decided *Parham v. J.R.*, the limits of mental-health reform became clear. There, the Court considered the constitutionality of a Georgia law permitting the institutionalization of minors when a parent and psychiatrist consented. Antipsychiatry activists and their allies turned *Roe* and its progeny into a symbol of the importance of privacy in making certain important life decisions. Psychiatrists saw *Parham* in very different terms. They argued that *Roe* recognized the rights of mental-health experts and family members to act on behalf of those who could not protect themselves.

Parham's conclusion that family members and therapists should make decisions for the mentally ill reflected a broader political shift. In a period of economic stagnation and popular interest in neoliberalism, attorneys and activists had to fight to preserve existing sources of funding. Local communities often failed to offer adequate services for those released from institutions. With many facing homelessness or turning to family members for care, a family-driven consumer movement captured the support of progressive members of Congress.

While attracting support for a broad idea of choice, radicals did not consistently convince judges, legislators, or coalition partners that those diagnosed with mental illness could make good decisions. Abstract ideas of privacy appealed to many of those whom patient-organizers courted but did little to reshape attitudes about the disenfranchised groups that the movement had tried to help.

Chapter 4 explores a dramatically different understanding of *Roe* in the same period, tracing the fate of other movements seeking to remake the medical system. While the government deregulated new areas of American life, the Food and Drug Administration (FDA) in the 1970s stepped up its efforts to protect the public. However, starting in the early 1970s, alternative medical practitioners used *Roe* as part of an attack on the regulation of the medical profession, the privileges of the medical elite, and the public's access to experimental treatments.

Those seeking access to unproven remedies claimed a right to choose any course of treatment free from the oversight of government and medical experts. The struggle unfolded partly around a potential cancer drug, Laetrile. Those seeking access to it argued that *Roe* had created rights for patients to choose any treatment they wished. Right-wing activists, politicians, and patients making this argument insisted that American law discriminated against medical consumers while empowering those purchasing any other good. The Laetrile movement also called for a transformation of the doctor-patient relationship. Patients, activists, and politicians suspicious of political and medical elites argued that existing class and professional hierarchies did more harm than good.

A clash between different visions of the future of the medical profession came to the surface during the litigation of *United States v. Rutherford* (1979), a case brought to force the FDA to allow terminally ill cancer patients access

to Laetrile. For some patients and practitioners, *Roe* stood for individual physicians' right to identify the best possible therapy without interference from the state. Joined by the federal and state governments, established organizations pushed back, arguing that patients and physicians had freedom to choose only safe, well-researched treatments.

While the Laetrile wars were raging, a related patients' movement demanded greater control over medical records. The movement for these rights, one that invoked *Roe* as part of its rhetorical agenda, emerged at the intersection of new conversations about privacy, government surveillance, technological change, and the meaning of discrimination.

Activists and politicians with radically different political visions argued that the right to privacy protected sensitive personal information. For Senator Barry Goldwater Sr., the Republican presidential nominee in 1964; his son, a conservative member of the House of Representatives; and the voters who supported them, *Roe*'s right to privacy guaranteed individuals' "freedom of identity" in the face of a growing array of welfare- and civil-rights regulations. By contrast, the ACLU and its allies in Congress maintained that privacy violations allowed discriminators to circumvent the civil-rights protections that some conservatives criticized. By contrast to the legal setbacks faced by alternative medical practitioners in the courts, proponents of information privacy scored impressive legislative victories, successfully advocating for state and federal legislation. Nonetheless, the medical-privacy movement stalled, failing in the Supreme Court in *Whalen v. Roe* (1977) and securing no major legislation until decades later.

These setbacks revealed that widespread consensus about the importance of patient autonomy concealed deeper disagreements about the scope of privacy protections and who deserved them. While most supporters of information privacy claimed to protect victims of unfair treatment, those across the ideological spectrum held deeply different views about what counted as discrimination and what role the government could play in ending it.

Moving into the later 1980s and 1990s, Chapter 5 explores the use of *Roe* and other privacy arguments by those seeking to create a right to death with dignity and equal treatment for the sick, disabled, and dying. This chapter tracks the changing politics of privacy, as arguments about the right to choose increasingly helped only those seeking a partnership with the Democratic Party and the grassroots movements aligned with it. Beginning in the 1970s,

groups advocating for a right to refuse lifesaving treatment gained ground. Notwithstanding its earlier successes, the right-to-die movement soon found itself plagued by disagreements about the relative merits of legislation and the value of legalizing assisted suicide. In spite of their differences, activists redefined privacy, framing their cause as involving not only freedom of choice but also equal treatment—requiring the state to respect the decisions of individuals traditionally affected by paternalism, including the disabled, the elderly, and women.

The ascendancy of right-to-die activism in the late 1980s and early 1990s prompted pro-lifers and disability-rights activists to articulate very different ideas about equal treatment. These two movements approached the issue in markedly different ways. Whereas pro-lifers described legal abortion and aid-in-dying as related attacks on the vulnerable, disability-rights activists, many of whom saw themselves as pro-choice, insisted that the kind of stereotypes decried by feminists in the abortion wars motivated those seeking a "right to die" for the disabled, sick, and dying. Demands for equal treatment, in this context, meant moving beyond assumptions that some handicaps or illnesses would make life no longer worth living and working harder to provide alternatives to disabled and sick people who despaired of a better life. By extension, as these activists saw it, equal treatment forbade lawmakers from substituting the judgment of family members or judges about when a disabled person's life stopped mattering.

The Supreme Court seemed to stabilize the conflict over the right to privacy and medical care in *Cruzan by Cruzan v. Director, Missouri Department of Health* (1990), encouraging Americans to rely on living wills, identifying a limited right to refuse treatment, and forestalling efforts to recognize a broader right. However, questions about the efficacy of advance directives and worries about the AIDS epidemic quickly revived discussion about aid-in-dying. In *Washington v. Glucksberg* and *Vacco v. Quill* (1997), the Supreme Court ultimately rejected claims for a constitutional right to assisted suicide, helping to reinstate the policy compromise many embraced after the *Cruzan* decision.

Chapter 6 studies the narrowing of privacy arguments by explaining how the *Roe* decision became a prominent feature in debates of the 1980s and 1990s about the role of the judiciary and the rule of law. Academics had long questioned the *Roe* Court's methods. In the 1970s, some feminist professors and

activists shared their own doubts about *Roe*. In the 1980s, after the Court signed off on laws banning Medicaid funding for abortion, more supporters of women's rights concluded that the very idea of a right to privacy would never get the movement far enough. But for other supporters of abortion rights, *Roe* and related arguments still held tremendous political potential. Using the decision as a source of material, these activists made *Roe* and a right to choose stand for ideas never expressed by the Supreme Court. Arguments connecting *Roe* and judicial activism did not always resonate outside the academy.

But by the 1980s, Republican leaders popularized arguments that *Roe* represented a dangerous form of judicial activism. Spreading hostility to *Roe* and the idea of judicial overreaching promised to unite an otherwise-fragmented group of activists interested in several other social issues. Ronald Reagan and his allies also redefined conscience-based protest. Conscientious objectors had made headlines during the Vietnam War when they asked the courts to sign off on exemptions from the draft. More recently, advocacy groups, including pro-lifers, had sought to write conscience-based exemptions into law. Reagan turned the idea of conscience into a political weapon, urging voters committed to democracy to choose candidates who would ensure that *Roe* was overruled. Gradually, mainstream pro-life organizations also bought into this rhetorical strategy.

But as more Americans identified *Roe* with judicial activism, a group of pro-lifers broke off from the mainstream, defining conscience-based protest in radically different terms. While abortion opponents had engaged in civil disobedience before 1973, the leaders of new groups like Operation Rescue justified a more unapologetic form of lawbreaking. If *Roe* violated the law, as these activists saw it, the Court had no binding authority, and those breaking the law to undermine the 1973 decision should not be viewed as criminals.

At first, this idea of conscience-based protest caught on with abortion opponents and conservative groups. However, when clinic blockaders brought their arguments to court, rejection of their brand of conscientious objection was almost universal. As blockaders dropped out, protestors more open to violence took on greater influence, and the popularity of blockades declined sharply. However, the period still witnessed the rise of a new understanding of both the *Roe* decision and privacy rights—one connected not to personal liberty but to the power of the judiciary in American society. As activists

realized that *Roe* sometimes stood for judicial activism, movement members questioned the value of casting their beliefs as an extension of the 1973 decision.

The Conclusion considers what *Roe*'s many uses tell us about the 1970s and the nation's emerging commitment to the right to privacy. While the decade saw the rise of a culture of individualism, the meaning of the right to autonomy so many embraced had rarely been more contested. Activists in the period disagreed about which areas of American life should be free from government regulation, unsuccessfully seeking to transform attitudes toward medicine and sex. Championing the right to choose, others demanded dignity and respect for those who needed assistance to thrive, including the disabled, the poor, and juveniles. Interpretations of the right to privacy did not yet center on freedom from state interference; some activists used the language of *Roe* to demand assistance from the government. Nor did use of the right to choose signal sympathy for the women's movement or an affinity with the political Left.

There was nothing predetermined about the political or legal ramifications of a new focus on privacy. This history highlights the missed chances and alternative paths that seemed so promising to activists in the 1970s, particularly for those who saw privacy and equality arguments as not only related to one another but almost inseparable. These arguments also reveal the missed potential of privacy arguments still so often used in American politics.

The story of *Roe*'s remaking reminds us of the irresistible pull of established legal models. We should not expect history to offer obvious lessons for the present. In the case of *Roe*'s reinterpretation, however, the past offers a chance to see the unmistakable reach of the law. Just the same, in looking to *Roe,* ordinary people made—and remade—law in ways rarely understood, appreciated, or recalled. This story also reminds us that what those people have accomplished, no matter how unexpected or significant, can be forgotten in the blink of an eye.

1

A History of Privacy Politics

More than forty years after it was decided, *Roe v. Wade* remains in the public eye. Scholars describe *Roe* as "America's most controversial decision," "undoubtedly the best-known case that the Supreme Court has ever decided." Indeed, a 2015 survey conducted by the television network C-SPAN found that *Roe* was the only Supreme Court decision recognized by a majority of Americans.[1]

It is no surprise that pollsters often identify *Roe* with a woman's right to choose abortion. The decision remains the most potent symbol of a conflict about reproductive rights that has bitterly divided the United States. Since 1992, the Supreme Court has no longer applied *Roe*'s trimester framework, but commentators still frame each major abortion case as a referendum on *Roe*. During presidential campaigns and judicial confirmation hearings, *Roe* appears as a symbol for legal abortion. Others make *Roe* stand for a range of related issues, from the fate of the sexual revolution to the agenda of the women's movement.[2]

But this is not *Roe*'s only meaning. For many, *Roe* reflects a growing commitment to a brand of equality that emerged in the 1970s, one that

required identical treatment but stopped short of remedying the effects of past subordination. After all, the Court suggested that all women needed to avoid the burdens of pregnancy and achieve equal status was freedom from the government, not more active support.[3]

Others believe that *Roe* captures the spirit of a culture of individualism that was ascendant in the 1970s. The decision defined a right to personal privacy and played down the ways in which communities, family members, or the government could share responsibility for an unplanned pregnancy. Still others see *Roe* as an embodiment of new national interest in small government. Between the Watergate scandal and the Vietnam War, more Americans in the 1970s began to see the government as part of the problem. Some think that *Roe* mirrors declining faith in the state, particularly since the Court questioned the legitimacy of government involvement in crucial areas of American life.[4]

However, if *Roe* reflects how American law, culture, and politics fundamentally changed in and after the 1970s, that story is far more complex than we often believe. Scholars have studied how social movements resisted the nation's rightward turn in the 1970s. Others have documented how groups from religious conservatives to environmentalists called for more, rather than less, government involvement. But by studying those who incorporated *Roe* into their rhetorical agendas, we can also see that many activists used the very language of privacy and individualism to describe different paths that the country could take. To the extent that the decision embodied a new cultural turn, social movements throughout the 1970s and beyond used *Roe* to contest what the new individualism would mean.[5]

But even in the 1970s, the abortion issue was intensely divisive, and scholars had already questioned the reasoning of *Roe*. If *Roe* was a flashpoint for controversy, why did any movement make the decision a symbol for its cause? Because of the uproar surrounding legal abortion, *Roe* was an unusually visible symbol. Moreover, *Roe*'s right to privacy hinted at more than liberty from the government. The decision emphasized the importance of individuals' ability to make the most crucial decisions in life for themselves. In this way, the Court's decision pointed to a possible relationship between time-honored ideas of personal privacy and new demands for individual self-control. Using *Roe* as a symbol allowed a wide variety of social movements

to take advantage of a possible relationship between privacy and individual choice.

Roe also served as a valuable weapon for social movement members redefining the relationship between the right to privacy and the role of government. The Court suggested that the judiciary would step in to protect personal rights against other powerful actors. Activists claimed that just as the courts could not protect abortion rights by standing idle, other branches of government had to do more to create meaningful privacy.

To be sure, many activists who invoked *Roe* were not discussing what the Supreme Court said in 1973. Following the Court's decision, supporters of abortion rightsworked to redefine it. Feminists framed *Roe* as a decision recognizing rights for women, rather than liberty for physicians and patients. Other activists cast *Roe* as a decision about autonomy. Outside the context of abortion, those who used *Roe* as a weapon referred not only to what the Supreme Court held but also to the reinterpretations of the decision that had gained currency in public debate. Activists at times gestured to concepts some already associated with *Roe,* like a right to choose or to control one's own body, without mentioning the decision directly. These reinventions of *Roe* were part of the decision's legacy.[6]

By studying these uses of *Roe* and arguments connected to it, we gain perspective on the rise and fall of strikingly different ideas about privacy. Activists used the right to privacy to demand protection and financial support from the government. Conservative as well as liberal groups invoked a right to choose in defending their causes. While advocates sometimes used *Roe* in advancing these contentions, the decision mostly played a part in a broader set of claims involving self-determination and personal liberty. With an understanding of these redefinitions of *Roe* and the privacy agenda to which they belonged, we can see how up for grabs the new political culture remained for most of the decade. Americans invoked the right to privacy in demanding respect for open same-sex relationships, protection from private acts of violence, and the financial support necessary to meaningfully exercise rights. Making *Roe* part of a larger set of privacy claims served the purposes of individuals promoting new ideas about who should have decision-making authority in the family and the doctor-patient relationship. Treating these uses of *Roe* as a starting point, we can see how unpredictable the conflict

about the value and meaning of individualism remained for more than a decade.

This history also shines a light on contemporary dialogue about privacy arguments. As early as the 1970s, critics of the *Roe* decision believed that the Court made a grave mistake in relying on a right to privacy. Academics across the ideological spectrum argued that *Roe* had not explained where the right to privacy came from or what its limits were. Others believed that privileging a right to privacy made it harder to seek certain forms of social change. Feminists, among others, suggested that privacy arguments could never effectively disrupt existing hierarchies of race, sex, or class. Skeptics further claimed that a privacy right offered no foundation for much-needed demands for state assistance or protection.[7]

Other commentators believed it was too soon to discard *Roe*'s conception of liberty. Rehabilitating *Roe* as a decision involving autonomy, these scholars and judges concluded that some understandings of privacy could be valuable weapons.[8]

But current fights about whether—and how—privacy arguments can be effective have a longer history. Today's debate represents just one point in a longer exchange about when and whether such rights deserve support. For some time, privacy claims brought to mind demands that have little to do with the narrow idea of freedom from government that is often dominant today. This history helps to explain why commentators take such different positions on whether privacy claims are worth the trouble. If privacy has meant so many things to different social movements, it should be no surprise that scholars and politicians disagree about what related arguments can accomplish.

Finally, this book contributes to appraisals of the *Roe* decision's legacy in American law and politics. Commentators have predicted that abortion rights would have gained far more adherents if the Court had stayed away from a privacy framework altogether. But social movements used *Roe* in battles almost entirely disconnected from the war over reproductive rights. We can make better sense of this history when we recognize that movements mentioning *Roe* often went far beyond anything that the Supreme Court had said, treating the decision as an inspiration and source of raw material. Understanding what *Roe* has meant requires an awareness of the ways that activists used the decision to reshape other areas of American life.[9]

The Origins of a Legal Right to Privacy

Starting in the late nineteenth century, commentators suggested that American law protected a right to privacy. Writing in 1879, Thomas Cooley, a judge and expert on tort law, defended what he called a "right to be let alone." Cooley imagined that privacy rights would serve as a new foundation for civil lawsuits. He defined privacy primarily as freedom from physical assaults or threats of violence. Cooley's idea of privacy never entirely faded from view, but the right to privacy soon took on many more meanings.[10]

Not long after the publication of Cooley's treatise on tort law, the right to be left alone caught on with a larger audience. In 1890, two young lawyers, Samuel Warren and Louis Brandeis, published an article in the *Harvard Law Review* arguing for new protections. Brandeis and Warren emphasized evolving cultural and technological threats to privacy. Their article decried a new fascination with gossip and an insatiable media demand for intimate details about celebrities' lives. New devices, like the Kodak camera, made it easier for the media to snoop. Like Cooley, Brandeis and Warren proposed a tort that could defuse some of these threats, allowing for lawsuits when the press publicly disclosed private facts.[11]

At the time Brandeis and Warren published their pathbreaking article, others framed privacy as the right to control one's public image. In the early twentieth century, the improvement of photographic technologies and the emergence of advertising as a major source of revenue led to an explosion in the use of individuals' pictures. Courts initially resisted recognizing a common-law right to control one's image, but the public seemed to support what the *New York Times* described as "the right of a decent woman to privacy, her right not to have her features used and hawked about as a trademark without her consent."[12]

In 1905, Georgia became the first state to recognize a right to control one's image. Paolo Pavesich sued when the New England Life Insurance Company used his image without his consent to sell life insurance. In vindicating Pavesich's claim, the Supreme Court of Georgia framed privacy as an individual's right to decide how and when he was seen by everyone else. "One who desires to live a life of partial seclusion has a right to choose the times, places, and manner in which and at which he will submit himself to the public gaze," the court explained.[13]

By the mid-1950s, most states recognized tort law claims for both the appropriation of an individual's image and the public disclosure of private facts. However, in the decades after *Pavesich*, new legal, political, and cultural trends made the threat of government snooping much more urgent. The years of alcohol prohibition from 1919 to 1933 revolutionized the surveillance arm of the federal, state, and local governments. With the expansion of the Federal Bureau of Investigation, the Border Patrol, and the state and federal prison system, government left a much bigger imprint on the daily lives of many Americans, particularly the poor, immigrants, and minorities who were disproportionately targeted by the war on alcohol.[14]

As more federal agents worked to enforce Prohibition, different surveillance techniques, including wiretapping, raised concern. In *Olmstead v. United States* (1928), the Supreme Court reviewed the conviction of several petitioners, including Roy Olmstead, a bootlegger who ran a lucrative operation extending from Seattle to British Columbia. Olmstead argued that the wiretaps used against him violated the Fourth Amendment: "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." The Supreme Court held that the wiretapping operation that brought down Olmstead did not violate the Fourth Amendment of the Constitution even though investigators had failed to get prior judicial approval for it. Writing for the majority, Chief Justice William Taft concluded that the Fourth Amendment had not been violated because there had been no search at all. "The evidence was secured by the use of the sense of hearing and that only," Taft reasoned. "There was no entry of the houses or offices of the defendants."[15]

Joined by Oliver Wendell Holmes and two other members of the Court, Louis Brandeis invoked the right to privacy in a scathing dissent. The idea he articulated differed from the one that animated the tort lawsuits of earlier in the twentieth century. Those cases often turned on an individual's desire to stay out of public life altogether or control how she was seen by others. In *Olmstead*, Brandeis instead framed privacy as a right to control access to sensitive information. His dissent emphasized that new investigative techniques could expose both "the most intimate occurrences of the home" and individuals' "beliefs, . . . thoughts, . . . emotions and . . . sensations."[16]

Because of the growing unpopularity of the war on alcohol, Brandeis's dissent touched a nerve. "Years ago, Mr. Brandeis, then a young lawyer, de-

fended the right to privacy. How much of it is left now?" the *New York Times* asked in an editorial on *Olmstead*. Brandeis's dissent also drove home how the new threats to privacy targeted sensitive information, rather than a person's likeness. Moreover, the government, not advertisers or newspapermen, stood behind the most troubling forms of intrusion. As the *New York Times* put it, Prohibition had "made universal snooping possible."[17]

Fear that the expansion of federal power threatened the right to privacy outlasted the ban on liquor. At the height of the Depression, Franklin Delano Roosevelt's New Deal popularized a new vision of the role of government, one in which the state would help to provide the kind of economic security that would allow people to enjoy their other liberties. The New Deal also sparked different worries about privacy. Government statisticians proposed a more meaningful national census to capture the economic needs of the American population. The 1940 census triggered serious privacy concerns: during Senate testimony on the subject, skeptics raised the specter of government "snoopers" who might disclose Americans' secrets to the larger public.[18]

In creating new entitlement programs, the New Deal also required a massive increase in the amount of data gathered and stored by the federal government. Programs like Social Security authorized the large-scale collection of personal information to determine individual eligibility. Technological improvements made during World War II enhanced the government's ability to process data. In the mid-1940s, the War Department funded computer technology to improve everything from the performance of fighter planes to the calibration of artillery. After the end of the war, these technologies rapidly spread in the private sector. Insurers, credit agencies, employers, and even retailers sought details about potential customers and hires. The Gallup and Roper Polls and the notorious Kinsey Report on American sexuality made more dimensions of American life visible to private employers, marketers, and the government.[19]

However, it was not until the 1960s that the right to privacy became a political preoccupation. In the period, Americans bridled at the lengthy employment applications and life-insurance inspections that pried information from unwilling applicants. The spread of credit cards and the increasing use of a Social Security number as a universal identifier convinced commentators that all Americans were under surveillance.[20]

Panic about privacy coalesced around the possibility of massive "data banks" holding information on everything from personal finances to drug addiction. In 1964, IBM launched the first commercially successful computer, the IBM 360. The media predicted that products like the 360 could "kill . . . freedom." In 1965, the Social Science Research Council proposed a central data bank that would use computer technology to pool all the data held by different government agencies. Intense backlash greeted the proposal, as members of Congress, reporters, academics, and other private citizens railed against new invasions into what the *New York Times* called citizens' "secret lives."[21]

The idea of a right to privacy also took on new meanings in the 1960s. Sociologist Michael Baker articulated a common view that computerization would shift power away from ordinary Americans and toward government agencies and businesses. If government actors and businesses controlled information, ordinary people lost the ability to shape their own sense of self. Public law scholar Arthur Miller warned: "There may be a very real sense in which a person will not exist outside of his computer dossier."[22]

It was in the crucible of an intense new debate about privacy that the Supreme Court developed the body of law that gave rise to *Roe v. Wade*. Decided the same year that Americans first protested the creation of a national data center, *Griswold v. Connecticut* (1965) made the right to privacy one of the most widely debated aspects of American constitutional law. The privacy protections described by Warren and Brandeis in 1890 stemmed from individuals' desire to stay out of public view. In *Olmstead*, Brandeis had relied on the Fourth Amendment, pitting individual privacy against government surveillance. By contrast, *Griswold* described an expansive right to privacy quite unlike anything that had come before.

Griswold and *Eisenstadt*

The *Griswold* litigation came at the end of a long period of experimentation by family-planning supporters, civil libertarians, and physicians committed to decriminalizing birth control. As early as the 1940s, Margaret Sanger, the founder of Planned Parenthood, connected birth control to civil liberties such as freedom of speech and religion. In Sanger's view, real liberty had to include "the right of free men and free women to control, as best they may, their

own destiny on earth," particularly decisions related to childbearing. While leaders of the American Civil Liberties Union (ACLU) did not immediately answer Sanger's call for support, by the late 1950s the organization had adopted a policy suggesting that bans on birth control violated the First and Fourteenth Amendments of the Constitution.[23]

In 1959, when the Supreme Court agreed to hear *Poe v. Ullman*, the ACLU joined the Planned Parenthood Federation of America and the Planned Parenthood League of Connecticut (PPLC) in challenging a state statute banning the use of contraception by married couples. The right to privacy occupied a privileged place in the briefs submitted by all three groups. The *Poe* appellants made some familiar arguments, focusing on inherently private places. In a brief on behalf of the Planned Parenthood League of Connecticut, Fowler Harper pointed to "the privacy of the home." Melvin Wulf of the ACLU agreed that "[w]hen the long arm of the law reaches into the bedroom . . . it is going too far." However, Planned Parenthood and the ACLU described a right to privacy that also protected the behaviors and decisions of married individuals. Wulf connected privacy to "the right to sexual intercourse," a matter that touched the very "marrow of human behavior." Harper echoed this reasoning, suggesting that a "right to be let alone in the bedroom" included a " 'right' to consortium."[24]

In *Poe*, the justices dismissed the case because the Court could find no "case or controversy" involved. Writing for the majority, Justice Felix Frankfurter concluded that Connecticut residents routinely violated the law without any fear of prosecution. "The undeviating policy of the nullification by Connecticut of its anticontraception laws throughout all the years they have been on the statute books bespeaks more than prosecutorial paralysis," Frankfurter wryly remarked. Only a few years later, Estelle Griswold, the executive director of the PPLC, and Yale professor C. Lee Buxton made a point of getting caught giving contraceptive advice to married couples. Buxton and Griswold's arrest and fine laid the groundwork for the suit that would become *Griswold v. Connecticut*.[25]

Planned Parenthood and the ACLU revived the constitutional privacy arguments made in *Poe,* but this time the strategy worked. In a majority penned by Justice William O. Douglas, *Griswold* struck down the Connecticut law. Rather than relying on any single constitutional amendment, Douglas wrote that "specific guarantees in the Bill of Rights have penumbras, formed

by emanations from those guarantees that help give them life and substance." According to Douglas, the text of the Constitution implied the existence of other privacy rights.[26]

Griswold emphasized that the Connecticut law all but required intrusion into the places where Americans most expected to be left alone, particularly "the sacred precincts of marital bedrooms." Nevertheless, Douglas's majority suggested that the right to privacy extended to the marital relationship, not merely the home. *Griswold* described marriage as part of a "right of privacy older than the Bill of Rights," "an association that promotes a way of life." In a concurrence that relied on the Ninth Amendment as a source of privacy, Justice Arthur Goldberg agreed that the right to privacy protected "the marital relation and the marital home."[27]

The understanding of privacy set out in *Griswold* broke from an earlier narrative centered on snooping and leaked information or even the control of one's image or identity. While focusing on the traditional importance of marriage, the Court described a far more expansive right. *Griswold* suggested that the right to privacy also covered certain relationships and life decisions.

Although the academic response to *Griswold* was mixed, the decision intensified interest in privacy arguments among feminists, civil libertarians, and family-planning proponents. Just the same, for all of these advocates, privacy claims remained one part of a much broader argumentative agenda. Feminists in organizations like the National Organization for Women (NOW) contended that women required control over their reproductive lives to enjoy meaningful equality under the law. ACLU members asserted that bans on abortion and contraception created the same problems as any other law on victimless crimes like gambling or certain kinds of recreational drug use.[28]

Just the same, the Supreme Court's next major case on birth control, *Eisenstadt v. Baird*, drew attention back to the right to privacy. Litigation in the case began when Bill Baird, a self-proclaimed crusader, was arrested for distributing contraceptive foam in violation of a Massachusetts state law. Whereas that statute permitted physicians to prescribe birth control for married couples to prevent sexually transmitted diseases or conception, the law allowed unmarried residents to get contraceptives only for disease-prevention purposes.[29]

When the case reached the Supreme Court, counsel for the state of Massachusetts insisted that Baird could not invoke the privacy right outlined in *Griswold*. After distributing birth control in front of a large crowd, Baird could hardly have expected to keep his activities secret. Moreover, the state asserted that *Griswold* focused on the traditional importance of the marital relationship, something that was irrelevant to the disposition of *Eisenstadt*. Planned Parenthood and the ACLU emphasized privacy arguments in amicus curiae briefs, but Baird's attorney, Joseph Tydings, primarily claimed the Massachusetts law served no rational purpose.[30]

In a majority opinion authored by Justice William Brennan, the Court recognized the importance of privacy to the case but ultimately struck down the Massachusetts statute on the basis Tydings had urged. The Court looked to the Equal Protection Clause of the Fourteenth Amendment in resolving the case, asking whether "some ground of difference . . . rationally explains the different treatment accorded married and unmarried persons." The Court considered three possible purposes for the statute: the deterrence of fornication, protection against dangerous contraceptives, and the expression of moral opposition to birth control. *Eisenstadt* concluded that the Massachusetts legislature could not reasonably have intended to prevent premarital sex given that the law punished the distribution of birth control more harshly than the act of fornication itself. Nor could the law really be framed as a health measure, particularly since not all contraceptives posed a health risk.[31]

In analyzing the last purpose proposed for the law, the Court did not address the question of whether the constitutional right to privacy allowed individuals to access birth control. Instead, *Eisenstadt* reasoned that after *Griswold* the right had to be "the same for the married and unmarried alike." The Court suggested that a more formal recognition of privacy rights could come soon. "[T]he marital couple is not an independent entity with a mind or heart of its own," the Court explained. "If the right to privacy means anything, it is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child."[32]

Eisenstadt redefined the privacy right set out in *Griswold*. The latter decision had concluded that the text of the Constitution implied the existence of

other rights, including privacy. Because the majority's penumbra theory had no clear boundaries, *Griswold*'s approach arguably could lead to the recognition of any number of privacy interests. *Eisenstadt* avoided the penumbra theory, striking down a law because it had no rational basis.

But *Eisenstadt* was in some ways a bolder decision. *Griswold* stressed the traditional importance of marriage in American society. *Eisenstadt* justified privacy rights because of their importance to individuals, not because of their historical pedigree. *Griswold* also described a privacy right belonging to a married couple. By contrast, *Eisenstadt* assigned the privacy right to individuals, "each with a separate intellectual and emotional makeup." Moreover, language in *Griswold* about the invasion of the marital bedroom arguably fit within a tradition focused on inherently private places or information. *Eisenstadt* made clearer that the right to privacy protected certain key decisions, not just physical spaces or confidential facts.

Decided one year after *Eisenstadt*, *Roe v. Wade* drew national attention to an abortion conflict that had already divided the country for more than a decade. Since the mid-nineteenth century, most states had banned most or all abortions. The push to reform the laws started in the 1940s and 1950s when obstetric and gynecological care improved. Medical progress made it less plausible for physicians to claim that the termination of a pregnancy was necessary to save a woman's life. In 1959, the American Law Institute (ALI) proposed a model law authorizing abortion under a narrow set of circumstances, including cases of rape, incest, or fetal defect. In the first part of the 1960s, several states adopted the ALI model, but women and physicians quickly grew frustrated with its limitations. Worried about the narrowness of reform exceptions and the ongoing threat of liability, few physicians made abortion much more accessible than it had been before. More aggressive organizations like the National Association for the Repeal of Abortion Laws (NARAL), later the National Abortion Rights Action League, campaigned for the elimination of all abortion restrictions. At the same time, antiabortion organizations spread across American cities and states, advocating for a fundamental right to life from conception to natural death.[33]

Roe did not begin the abortion wars, but it changed the course of the conflict. *Roe* helped to nationalize the pro-life movement and focus debate on the opposing rights at issue. However, the impact of the decision reached well beyond debate about abortion. Closely examining the reasoning and lan-

guage of *Roe* helps to explain why it exposed such deep fissures in American society. By looking under the surface of *Roe,* we can also see why such a diverse group of social movements used the decision as a weapon despite the controversy the decision provoked.[34]

The *Roe* Decision

Decided the year after *Eisenstadt*, *Roe* involved a Texas abortion statute that outlawed abortion unless a woman's life would be put at risk. *Doe v. Bolton, Roe*'s companion case, analyzed a variation of the ALI model statute. The Georgia statute in *Doe* further required all women to satisfy certain procedural requirements, including approval by a hospital committee.[35]

Backed by several groups supportive of abortion rights, a single pregnant woman, a childless couple, and a physician questioned the constitutionality of both laws. The challengers asserted, among other things, that the statutes violated a fundamental right to privacy. *Roe,* the lead case, began by looking at the history of abortion regulation. Justice Harry Blackmun's majority opinion drew three possible rationales for abortion bans from this history. The Court readily dismissed the idea that the Texas law served to discourage illicit sex, emphasizing that it prohibited abortion for married as well as unmarried women. *Roe* gave more weight to state justifications based on protecting women's health and fetal life.[36]

The Court evaluated whether those interests were strong enough to justify interference with the right to privacy. Citing a line of decisions reaching back to the 1920s, *Roe* suggested that the right to privacy "has some extension to activities relating to marriage, . . . procreation, . . . contraception, . . . family relationships, . . . and child rearing and education." Insofar as abortion involved similar interests, *Roe* held that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[37]

The Court emphasized the consequences of preventing women from seeking an abortion. The privacy right mattered to women because of the health risks they faced, as well as "the stigma of unwed motherhood," and the "[p]sychological harm" resulting from child care. The Court made clear that physicians as well as women would be involved. The impact of unintended pregnancy on a woman's life was not a call for women's liberation but rather

a matter that "the woman and her responsible physician [would] consider in consultation."[38]

Roe concluded that the Texas abortion ban violated the Constitution even though the government had compelling interests in regulating abortion at some point in pregnancy. While emphasizing that modern medicine had made abortion a far safer procedure, *Roe* underlined that the "[s]tate has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that ensure maximum safety for the patient." The Court reasoned that the government had a stronger interest in women's health the longer a pregnancy progressed.[39]

Much of the Court's analysis focused on the government's interest in protecting fetal life. The Court first considered whether the Fourteenth Amendment to the Constitution included unborn children among the persons entitled to due process and equal protection under the law. Looking at the use of the term "person" elsewhere in the Constitution and prevailing usage in the nineteenth century, when Congress ratified the amendment, the Court concluded that the term applied only postnatally.[40]

Roe next addressed whether the government had a compelling interest in protecting human life "from and after conception." The Court emphasized the disagreement that existed across a variety of disciplines about when life began. "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus," *Roe* explained, "the judiciary . . . is not in a position to speculate as to the answer." However, the Court did not altogether play down the government's interest in fetal life. The majority described the state's interest in "protecting the potentiality of human life" as both "important and legitimate." At the point of viability, when a child could survive without medical assistance outside the womb, *Roe* treated the interest in fetal life as compelling. Thus, in the first trimester, the Court held that "the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." Later, given the government's weighty interests in protecting women's health and fetal life, the government had more latitude to regulate. Applying the framework *Roe* created, *Doe* struck down the Georgia abortion statute, highlighting the importance of giving the "attending physician the room he needs to make his best medical judgment."[41]

Not long after the Court's decision, supporters of abortion rights popularized their own interpretations of it, including those involving a right to choose and a right to control one's own body. Both ideas predated the *Roe* decision. One grew partly out of *Women v. Connecticut,* a lawsuit challenging that state's abortion law. During the suit, women's liberation advocates hosted the Women's National Abortion Conference in the fall of 1971, adopting the slogan "Abortion: A Woman's Right to Choose." Feminist groups continued to invoke a right to choose before *Roe.* The Women's National Abortion Action Coalition (WONAAC), formed in 1971 by the Socialist Workers Party to recruit more members, described abortion as both a "right to choose whether or not [to] bear children" and a right to "control [one's] body." Other organizations, like NOW, incorporated choice claims into a broader agenda. While presenting abortion as a means of controlling population growth or a public health measure, some NOW members also talked about the importance of autonomy. "The issue," said NOW president Wilma Scott Heide in discussing abortion in 1971, "is choice."[42]

After *Roe,* abortion-rights organizations promoted their own interpretations of the decision. Before 1975, when speaking to the public, major groups primarily described *Roe* as a decision involving rights for physicians and patients. Believing that feminist interpretations of the decision would not appeal to a broad cross section of Americans, some groups favored alternative understandings of *Roe.* At a July 1974 executive committee meeting, NARAL leaders urged members of the group to "stress the legal aspects and public health benefits of abortion." Those present agreed that emphasizing "'a woman's right to choose abortion' is sometimes not a good strategy." Nevertheless, when speaking to one another, rallying supporters, or raising money, abortion-rights organizations often equated *Roe* with a right to choose or a right to control one's own body.[43]

Feminist groups put special emphasis on such interpretations of *Roe,* describing the decision as one recognizing rights only for women and linking privacy to freedom of choice. In a 1973 fundraising letter, NOW described *Roe* as follows: "[T]he Court decided that the government should not abridge your freedom to decide the size and spacing of your family." In 1974, the group hosted a Mother's Day protest to "protect . . . [the] right to choose." When instructing members on how to lobby against a proposed antiabortion

amendment to the Constitution, NOW lobbyists stayed away from claims involving choice or control over one's body, but when explaining the rationale for action, lobbyists Jan Liebman and Ann Scott highlighted that "the right to choose [was] at stake."[44]

After 1975, arguments about choice and self-control became a more visible part of abortion-rights advocacy. When speaking to lawmakers or the media, movement members more often insisted that women alone had abortion rights. In 1976, NOW put out a press release defending *Roe* and claiming "that the right to choose and the right to privacy remain . . . fundamental human freedom[s]." As NARAL and its allies invested more in swinging elections, the group built its campaign around the idea of choice. One brochure explained the theme of a major protest event in 1979 as follows: "[W]e are the majority, we are pro-choice and WE VOTE!"[45]

But supporters of abortion rights were not the only ones seeking to reinterpret *Roe*. A wide variety of social movements used *Roe* and its right to privacy to advance their cause. Groups working on issues from access to alternative medicine to death and dying sometimes used the decision as a symbol. Why did *Roe* seem to be a useful weapon when abortion had already become so controversial? Part of the answer lies in the Court's 1973 decision. *Roe* was the most recent and most widely discussed major privacy case. Because of the growing controversy surrounding abortion, more Americans were likely to have heard of *Roe* and to know something about what the decision stood for. Social movements seeking a powerful symbol could operate more effectively when drawing on a decision that needed no explanation.

Roe also seemed to attach more weight to the privacy right than did either *Griswold* or *Eisenstadt*. In *Griswold,* the Court struck down the only law of its kind in the nation, one that some believed had no defensible purpose. *Eisenstadt* specifically held that the Massachusetts law at issue in the case had no rational basis. By contrast, *Roe* recognized a privacy right that trumped important state interests for much of pregnancy, and the Court's decision invalidated laws on the books in the vast majority of American states. Many read the decision as identifying the special significance of constitutional autonomy interests and calling into question any law that burdened them.

Roe also framed the right to privacy in ways that movements found advantageous. For those interested in reforming the delivery of health care, *Roe*'s emphasis on the physician-patient relationship made a difference. *Roe*

also hinted that privacy was a matter of choice or decision making rather than seclusion. A variety of activists believed that similar arguments about autonomy could transform conventional ideas about who deserved the power to make key decisions and what liberty really involved. Many hoped that, by more explicitly framing privacy as a matter of autonomy, *Roe* had laid the foundation for more radical campaigns to test the boundaries of a right to choose.

Moreover, *Roe* had inspired popular reinterpretations that movements could rework. Almost as soon as the Supreme Court issued its decision, feminists identified the decision with a right to choose and a right to control one's body. To some extent, the connection between freedom of choice and privacy was implicit in the *Roe* decision. The Court spoke of a woman's right to make "the decision whether or not to terminate her pregnancy," and it was not hard for activists to see the Court's decision as protecting the right to choose. But activists also took raw material from the *Roe* decision to make something new. Advocates described abortion as a right to choose and a right to control one's own body partly because they believed that these terms captured the true meaning of the Constitution, a meaning that they hoped the Court had understood. Activists also reinterpreted *Roe* for strategic gain, pushing an interpretation that might leave less room for the regulation of abortion or make it easier to attract recruits.

Those working on issues completely unrelated to abortion saw tremendous value in these interpretations of *Roe*. Activists attacking morals regulations championed choice in sexual matters. Those defending ex-psychiatric patients insisted that the freedom of choose belonged to everyone, including those thought to be dependent on others. Advocates seeking access to unproven remedies described *Roe* as a decision leaving control of medical care wholly in the hands of patients. Those interested in a right to die framed *Roe* as a decision linking identity and self-control. These movements did not limit themselves to what the Supreme Court had said. Activists looked to popular reworkings of *Roe* and contributed ideas of their own.

While social movements disconnected from the abortion wars used *Roe* as a valuable tool, the decision also quickly became a touchstone in academic debate about the inherent worth of privacy arguments. Early critics questioned the Court's doctrinal approach. Joined by feminists, disparate scholars argued that any privacy strategy would almost necessarily preserve the

status quo. Other commentators instead believed that the liberty defined in *Roe* could be the starting point of a far more promising approach. These scholars worked to carve out arguments that would capture concerns about dignity, personhood, and autonomy that were only implicit in *Roe* itself. Over time, this debate reached beyond the academy.

Why do judges, scholars, and activists see privacy arguments so differently? Recovering the history of those who reinvented *Roe* helps to answer this question. For more than a decade, diverse politicians and movement members put *Roe*'s right to privacy to bold new uses. Later, as conservatives and pro-lifers sought to redefine the 1973 decision, the costs of relying on privacy arguments increased considerably, and few movements made *Roe* shorthand for new social, political, or cultural demands. With a better understanding of this history, we can make sense of the widely divergent ideas about privacy that still dominate scholarly and political debate.

Questioning the Potential of Privacy Arguments

Controversy about the *Roe* decision began as soon as the Court published its opinion. While most pro-lifers focused on the Court's refusal to recognize either the personhood of the fetus or a fundamental right to life, academic commentators primarily debated the merits of *Roe*'s privacy right. These criticisms began within the Supreme Court. Dissenting in *Roe,* Justice William Rehnquist had "difficulty finding . . . that the right to 'privacy' [was] involved" in the case. Rehnquist concluded that neither the text of the Constitution nor its history suggested that the right to privacy covered abortion. "The only conclusion possible," Rehnquist wrote, "is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter."[46]

A diverse group of scholars soon expressed similar concerns. John Hart Ely, a commentator sympathetic to the legalization of abortion, explained that the Court's reasoning had "nothing to do with privacy in the Bill of Rights sense or any other that the Constitution suggests." Other commentators agreed that "*Roe* cut fundamental rights adjudication loose from the constitutional text." Alexander Bickel, the dean of Yale Law School, accused the Court of legislating rather than interpreting the Constitution. "In place of

the various state abortion statutes in controversy and in flux," Bickel wrote, "the Supreme Court prescribed a virtually uniform statute of its own."[47]

Roe met with a different kind of friendly fire in the following years. First, some contended that the Court's privacy approach made it harder to understand the discrimination that deprived some citizens of control over their own lives. Those writing in this vein regretted that *Roe* had not emphasized the relationship between fertility control and equal treatment for women. Legal scholar Sylvia Law argued that "the rhetoric of privacy . . . blunts our ability to focus on the fact that it is women who are oppressed when abortion is denied." Ruth Bader Ginsburg similarly concluded that *Roe* lost support because of "the opinion's concentration on a medically approved autonomy idea, to the exclusion of a constitutionally based sex-equality perspective." Many agreed that privacy arguments created obstacles for those challenging the subordination of disenfranchised groups. Indeed, when leading scholars took up the task of writing "what *Roe v. Wade* should have said," a strong majority preferred equality arguments over those involving privacy.[48]

Legal scholars and historians also spotlighted the relationship between privacy arguments and economic inequality. Anxieties about privacy and poverty peaked after 1976 when Congress banned Medicaid funding for abortion. Four years later, in *Harris v. McRae*, the Supreme Court held that *Roe* did not require a right to abortion funding, only freedom from state interference. *McRae* sounded an alarm for commentators previously invested in privacy arguments. "In the late twentieth century, many middle class women felt secure that *Roe v. Wade* . . . had defined their 'right to privacy' to make reproductive decisions for themselves," explained historian Rickie Solinger. "Yet many late twentieth century public policies have had profound impacts on the 'private' decisions of poor and other resourceless women." Rosalind Petchesky similarly worried that *Roe* ignored the reality that real autonomy depended "not as much on the content of women's choices, or the 'right to choose,' as it [does on] the social and material conditions in which choices are made." Legal scholar Robin West agreed: "[T]he choice rhetoric of *Roe* undercuts the arguments for . . . the rights of caregivers, women and men both, to a level of public assistance for their caregiving work."[49]

For many, privacy arguments not only failed to speak to the fact that poor people needed government aid to realize certain rights. As other

commentators recognized, privacy claims also assumed that individuals needed protection from the government, not from one another. As a result, *Roe* and cases like it offered little solace to anyone victimized by private acts of violence. Catharine MacKinnon contended that "[t]he legal concept of privacy can and has shielded the place of battery, marital rape, and women's exploited labor." Other commentators stressed that privacy arguments fed into a culture of selfishness that denied citizens' responsibilities to one another. As legal scholar Ruth Colker reasoned: "The *Roe* privacy argument . . . was embedded in an individualist . . . framework."[50]

Attacks on *Roe* drew a vigorous response from those convinced that *Roe* had simply done a poor job of explaining constitutional autonomy. Legal scholar Anita Allen suggested that the problems with *Roe*'s privacy right stemmed largely from doctrinal confusion: the case focused on the autonomy to make crucial decisions rather than on any conventional idea of privacy. Allen nevertheless saw autonomy arguments as indispensable. "The liberal conception of sexual equality is scarcely furthered by decisional privacy if women do not and cannot use their private choice," she stated. Scholars Linda McClain and Dorothy Roberts agreed that a reliance on privacy arguments did not automatically foreclose equal outcomes for minorities or the poor.[51]

After 2003, when the Supreme Court struck down sodomy bans in *Lawrence v. Texas*, other commentators expressed hope that privacy and liberty arguments had unexplored potential. *Lawrence* convinced legal scholars such as Pam Karlan and Laurence Tribe that liberty arguments of the kind recognized in *Roe* formed part of a constitutional tradition that included arguments involving equality and dignity.[52]

By using *Roe*'s shifting meanings as a lens, this book historicizes battles about the promise of privacy arguments. Existing studies have offered important perspective on the role of privacy claims in a range of current debates, and scholars have thoughtfully explored the upside and risks of such arguments. Nevertheless, commentators debating privacy arguments react not only to their abstract virtues or vices but also to their varied definitions across the decades. Taking *Roe*'s many interpretations as a valuable case study, we can get a more principled view of how differently privacy rights have been defined over time and how profoundly varied understandings of *Roe* and its autonomy right have been.

Defining *Roe*'s Legacy

Criticisms of *Roe*'s privacy approach have fed into debate about the decision's place in history. Judges and scholars with dramatically different views about abortion argue that the decision polarized discussion of gender issues, emboldened extremists, and saddled feminists with an unconvincing privacy argument. For many, the Court's reliance on a privacy rationale explains much of this unintended damage. Cass Sunstein suggests that *Roe* "probably contributed to the creation of the 'moral majority'; helped defeat the Equal Rights Amendment; prevented the eventual achievement of consensual solutions to the abortion problem; and severely undermined the women's movement." Sunstein attributes much of the blowback from *Roe* to the Court's privacy reasoning. As he puts it, *Roe*'s effectiveness "has been limited largely because of its judicial source."[53]

Ruth Bader Ginsburg likewise has connected backlash to *Roe* to the Court's embrace of a sweeping privacy right. She has suggested that a narrow opinion, striking down Texas's expansive law and nothing more, might have served "to reduce rather than fuel the controversy." In Ginsburg's view, *Roe* escalated conflict because the opinion was as unpersuasive as it was broad.[54]

Although preferring a different jurisprudential approach, Justice Antonin Scalia similarly concluded that the Court's reasoning explains much of the ongoing polarization of abortion politics. "As long as this Court thought (and the people thought) that we Justices were doing essentially lawyers' work up here—reading text and discerning our society's traditional understanding of that text—the public pretty much left us alone," Scalia explained. He claimed that by inventing a privacy right disconnected from text and history, *Roe* brought on a political battle that shows no sign of abating. Scalia argued that because the *Roe* Court treated "[t]he 'liberties' protected by the Constitution [as] undefined and unbounded," ordinary people protested "that we do not implement *their* values instead of *ours*."[55]

Other scholars point to the breadth of the *Roe* Court's decision in explaining the harm done by *Roe*'s privacy right to American law and politics. Michael Klarman treats *Roe* as a prime example of what goes wrong when a broad Court decision outpaces popular opinion on a particular subject. While Americans in the 1970s might have endorsed an abstract right to privacy, the

Court defined that right expansively in ways that the public did not yet support, intensifying opposition. William Eskridge and John Ferejohn likewise invoke *Roe* as an illustration of the problems courts create for social causes when they define constitutional interests not yet backed by most Americans. Eskridge and Ferejohn identify *Roe*'s privacy approach as a "mistake" because the Court "announce[d] a Constitutional right prematurely."[56]

Grassroots activists and scholars echo concerns about the impact of *Roe* on the reputation of the courts and the intense partisanship that has plagued American politics. Speaking in 1981, Dr. John Willke of the National Right to Life Committee argued that *Roe*'s broad privacy approach had turned America into "a Nation that is totally polarized on this issue." Justice Scalia also asserted that *Roe* "destroyed the compromises of the past [and] rendered compromise impossible for the future." Michael McConnell and Richard Posner share this concern, suggesting that *Roe*'s privacy approach "cut . . . off deliberation and debate, [made] compromise impossible, and eliminat[ed] political solutions."[57]

Studying *Roe*'s many uses beyond the abortion debate puts these evaluations of the decision's long-term impact in question. As I have argued elsewhere, the history of the decade after *Roe* undermines any suggestion that a single Supreme Court decision produced the polarization and extremism so often seen in the abortion wars.[58]

However, conventional appraisals of *Roe*'s legacy are incomplete as well as inaccurate. In evaluating whether *Roe* did more harm than good, scholars look almost exclusively at abortion law and politics. Equally important, commentators tend to focus on what the Supreme Court held, sometimes missing the ways that lawyers, politicians, and activists used the opinion as a source of arguments and ideas. When we pay more attention to these reworkings of *Roe,* we see that the decision became a focal point in a variety of other social and legal struggles. If we know more about why *Roe* spoke to so many activists, discussion of the decision's long-term impact will be more complete.

Roe also seems to offer unique insight into the importance of the 1970s in shaping American law, culture, and politics today. The decade left a lingering mark on the nation, witnessing the rise of growing economic inequality, the transformation of constitutional law, and the creation of a more inclusive society. *Roe* reflects many of the most influential shifts of the period. Looking

more deeply at its varying uses offers valuable perspective on the legacy of the 1970s in American history.

Roe and a Larger Cultural Shift in the 1970s

Roe v. Wade seems to capture many of the changes that so significantly marked the 1970s. Once seen as little more than a period of selfishness and economic decline, the decade has more recently taken on an important role in explaining the contemporary political landscape. In the 1970s, the nation charted a course toward smaller government and embraced a new individualist ethic. The income inequality that features so prominently in current political discussion became visible in the 1970s, and a fragile and sometimes superficial commitment to some forms of equal treatment took hold, particularly for minorities and women. *Roe* seemed to express many of the changes that defined the decade.

Much as the Supreme Court limited government's supervisory role over abortion services, lawmakers scaled back on regulation in other areas. Following a series of hearings chaired by Senator Edward Kennedy (D-MA), President Jimmy Carter put an end to the Civil Aeronautics Board. Before Ronald Reagan took office, airlines, railroads, and interstate trucking had all been deregulated. Reagan expanded on this effort, introducing a cost-benefit analysis for all new regulations and applying the logic of deregulation to the Environmental Protection Agency (EPA) and the Occupational Safety and Health Administration (OSHA).[59]

For much of the 1970s, support for deregulation crossed political lines. Some saw greater reliance on free markets as a necessary step in guaranteeing consumer rights. Ralph Nader, a crusading lawyer, drew on the work of left-leaning economists in arguing that certain regulations opened the door for the capture of government agencies by "wasteful cartel[s]." Nader and Kennedy took on the overcharges they associated with the rate setting, entry barriers, and delays endemic at many agencies. On the campaign trail, Ronald Reagan redirected these arguments. Reagan asserted that regulation held back economic growth and frustrated business owners. David Stockman, the director of the Office of Management and Budget, stated that the EPA had "rules that would shut down the economy if they were put into effect."[60]

Bipartisan enthusiasm for free markets matched declining belief in the competence of the government. Federal authorities seemed powerless or worse in the face of the Watergate scandal, a deeply unpopular war in Vietnam, and inflation and oil crises. Privatization promised lower prices, broader consumer choice, and more competition between businesses. In 1981, Michael Deaver, a Reagan staffer, noted that major media outlets seemed sympathetic to Reagan's free-market ideology. "Maybe it's time to reassess. Maybe we don't need so much government," Deaver stated.[61]

Although Reagan and Nader disagreed about the goal and scope of deregulation, they defined the role of the market in overlapping ways. Both suggested that under certain circumstances, individual consumers and businesses could effectively police industries without help from the government. Both also had faith in consumers, suggesting that individuals had a right to expect competitive pricing and quality services. Deregulation always had its critics, Nader among them, who eventually concluded that the state had retreated too far. Nevertheless, over the course of the decade, many Americans came to see small government and privatization as a path to economic growth and consumer freedom.

Roe seemed to echo newfound optimism about market-based solutions. The Court's decision emphasized improvements in abortion care and suggested that, for most of pregnancy, consumers and providers should have the freedom to make decisions without state interference. Moreover, *Roe* relied on the notion of choice, an idea that Rickie Solinger calls "the most consumerist idea of our time."[62] The Court emphasized ways in which the abortion decision had farther-reaching ramifications than many other consumer decisions, and the decision implied that reproductive care bore a significant relationship to women's interests in equal citizenship. Nevertheless, *Roe* followed a broader trend in limiting the role of government and deferring to the decisions of private individuals.

The idea of privacy set out in *Roe* also seems to closely track the rise of an individualist model of rights that had limited power for minorities or the poor. Congress wove a model of individual rights into Title VII of the Civil Rights Act in 1964, and the Court interpreted the Equal Protection Clause of the Fourteenth Amendment to outlaw individual discrimination on the basis of race, sex, illegitimacy, and national origin. Applying Title VII, the Court recognized disparate-impact claims, allowing workers to challenge employer

practices that disproportionately harmed those traditionally left out at work. The ACLU Women's Rights Project and other feminist attorneys helped to win decisions outlawing sexual harassment at work and recognizing the connection between sex stereotyping and unconstitutional discrimination.[63]

However, many of these innovations had limits, particularly for minorities and the poor. The country's conservative turn had reverberations in Congress, the White House, and the courts. Furthermore, Congress passed Title VII during a period of deindustrialization. The new service economy created dead-end jobs that particularly affected women and minorities. Over the course of the 1970s and 1980s, the courts limited the reach of disparate impact in the Title VII context and refused to apply it under the Equal Protection Clause. The law's focus on discriminatory intent made it harder to challenge policies that primarily hurt minorities or women increasingly concentrated in low-skill, low-wage jobs.[64]

Poor and minority women also lost out when the Supreme Court ignored a connection between sex discrimination and reproduction. Not long before upholding the Hyde Amendment, the Court concluded that pregnancy discrimination violated neither the Fourteenth Amendment nor Title VII. After intense lobbying, Congress passed the Pregnancy Discrimination Act in 1978, but the law did not require employers to accommodate anyone. Middle-class women often had the resources to balance child-care commitments and work that poor women lacked.[65]

At the same time, efforts to secure rights for the poor failed in Congress and the courts. Led by groups like the National Welfare Rights Organization (NWRO), poverty-rights advocates waged a losing battle for legislation that would guarantee a minimum income. In the early 1970s, President Nixon vetoed a law that would have mandated universal, publicly funded child care. Congress did introduce automatic cost-of-living adjustments for recipients of Social Security and created the Supplemental Security Income program, but these laws primarily helped the elderly and disabled. Hostility to the welfare state united Americans with disparate beliefs, dooming a further fight for welfare rights from the start.[66]

For much of the 1960s, the Supreme Court had held out more hope as a place where rights to government support might be recognized. The Court had already struck down certain residency requirements for welfare recipients and concluded that some state and local governments did not provide

enough procedural protections before cutting off benefits. But by the end of the 1970s, in decisions on abortion, welfare, and procedural due process, the Court had effectively closed the door on the idea of a right to state assistance.[67]

Roe seems to offer a prime example of the kind of right that triumphed in American law and culture by the end of the decade. The majority opinion did not reflect on the structural reasons that some women could access reproductive health care while others could not. The liberty the Court defined pitted individual women and doctors against the state, but *Roe* did not acknowledge how nonstate actors, such as partners, pro-life protestors, or unwilling physicians, could make the exercise of a new fundamental right all but impossible. Moreover, the Court emphasized individual needs, not the collective experiences of women. *Roe* seemed to recognize the kind of right that triumphed in the 1970s, one that would define constitutional culture in the years to come.

It is not wrong to conclude that *Roe* encapsulates an individualist culture taking shape in the 1970s. However, by looking closely at all of the ways Americans redefined *Roe,* we see that the trajectory of the new individualism remained profoundly unsettled for some time. Pointing to *Roe,* advocates called for protection against violence at the hands of everyone, not just government actors. Privacy arguments tied to *Roe* fit in the agenda of groups asking for dignity and respect for groups thought to be incompetent, thereby destabilizing existing hierarchies in the home and in the workplace. Activists sometimes relied on *Roe* to demand support for the poor from the government. The United States may have embraced individualism, but for some time it remained far from clear what that would mean for the nation's future.

2

Sexual Liberty

In the 1970s, the slogan "a right to choose" became a familiar sight everywhere from protest rallies to news reports. However, the meaning of that right, and its connection to *Roe,* remained uncertain for some time. While many initially interpreted *Roe* as involving the right of physicians and patients, feminists insisted throughout the 1970s that the Court had recognized a woman's right to control her own body. In abortion law and politics, the meaning of *Roe* was contested throughout the decade.[1]

As some tried to make *Roe* shorthand for women's autonomy, other activists raised questions about how far a related right to privacy reached. The spread of *Roe*-related privacy arguments in the courts should come as no surprise, given attorneys' traditional reliance on precedent. However, the idea of a sexual right to choose influenced grassroots activism, coalition-building, and lobbying as much as it did litigation. Advocates sometimes mentioned *Roe* by name. On other occasions, movement members relied on concepts connected to the Court's decision, such as a right to choose or a right to control one's body. These claims offer perspective on a larger effort to reinvent the idea of privacy. Many dissatisfied with the status quo hoped that the "recent Supreme Court decision concerning state abortion statutes" would

"form the basis for a full-scale attack on laws which render criminal certain forms of sexual conduct."[2]

Richard Burns began taking an interest in the idea of sexual liberty when he came out of the closet as a sophomore at Hamilton College in upstate New York. Isolated at a conservative school, Burns often spent time at the library poring over *Gay Community News* (*GCN*), the first gay and lesbian weekly in the United States. After graduating, he moved to Boston with the idea of joining the paper. He volunteered at *GCN* until he became a member of the staff. Both lesbians and gay men saw the paper as an indispensable organizing tool. As Burns recalls: "[T]he framework of feminism had an impact on the men, and the men's sex-liberation framework had an impact on the women."[3]

Burns stayed at *GCN* until he went to law school. After graduating, he became a founding member of the Gay and Lesbian Advocates and Defenders (GLAD), one of the movement's major forces in public-interest litigation. But even before Burns went to law school, he and the activists he met from across the country used the right to privacy in articulating a unifying ideology. As Burns still puts it: "Why did gay people deserve protection under the law? It was *Griswold [v. Connecticut]* and *Roe*."[4]

Attorney Alan Silber came to prioritize privacy arguments in a very different way. At dinner with a close friend and fellow lawyer, Robert Baime, Silber heard the story of Baime's client Charles Saunders, the son of a maid who had worked for a family friend. Saunders got into trouble after a sexual encounter with women alleged to be sex workers. Although prosecutors had originally charged Saunders with rape, a jury convicted him only of the lesser included charge of fornication and fined him a nominal amount of money. Baime was delighted by the result, but Silber chided him. Because he thought that the fornication statute was outdated and unconstitutional, Silber viewed Saunders' conviction as a travesty. He decided to challenge the fornication law himself.[5]

He took the case all the way to the New Jersey Supreme Court, winning a ruling that the right recognized in *Roe* logically extended to a right to sexual privacy. After Silber got word of the New Jersey Supreme Court's decision, he called Baime and asked how the pair should celebrate. The two recalled that, after Prohibition, Americans had celebrated by having a drink. With fornication bans no longer on the books, Silber and Baime could think of only one suitable response.[6]

As Burns's and Silber's stories suggest, a diverse cross section of reformers in the 1970s made *Roe* part of their rhetorical arsenal. Activists seeking to remake laws on sex and sexuality had used privacy arguments before 1973. But for those interested in reinventing the law governing sexual relationships, *Roe* appeared to have unique value as a rhetorical weapon. Even though *Roe* already carried with it the controversy surrounding abortion, the decision hinted that popular notions of privacy tied into more radical arguments about autonomy and bodily integrity, both of which were central to contests about the regulation of sexuality.[7]

In this way, the National Organization for Women (NOW) made the right to control one's body part of an effort to create a coherent agenda that covered sex education, rape-law reform, and lesbian rights. Members of the American Civil Liberties Union (ACLU) used *Roe* to help dismantle archaic laws criminalizing victimless behavior. Call Off Your Old Tired Ethics (COYOTE), an advocacy organization for sex workers, invoked sexual privacy to question the stigmatization of the sexual decisions made by women and minorities. Pointing to the importance of choice and privacy, gay and lesbian activists struck a balance between grappling with entrenched intolerance and demanding respect for gay identity and committed relationships. These social movements sometimes worked in parallel. At other times, activists championing different causes influenced one another and worked closely together. Lesbian feminists brought ideas from the women's movement into the battle to end discrimination based on sexual orientation. COYOTE members collaborated with feminist groups and ACLU attorneys. Whether sex was for money or for free, whether it was with someone of the same sex or the opposite sex, activists insisted that sex was always an "issue of self-determination . . . the right to control our own bodies."[8]

These advocates developed ideas of privacy that are no longer common. Feminists insisted that the right to control one's body entitled women to protection against private acts of sexual violence, not just freedom from the government. Gay and lesbian activists used the idea of a right to choose to argue for tolerance for relationships and acts of self-expression outside the home.

By the mid-1980s, however, coalition members less often pursued these ideas of privacy. With the mobilization of the New Right and Religious Right, those seeking to challenge sex laws found themselves on the defensive. But

independently of any threat posed by the Right, consensus on the boundaries of sexual privacy collapsed. Feminists disagreed with one another and with some civil libertarians about the meaning of sexual consent. For strategic reasons, gay-rights activists shied away from arguments framing sexuality as a matter of choice, instead playing up claims that sexual orientation was an immutable trait.

Activists' use of *Roe* and ideas related to it exposes the potential that privacy claims held for those rethinking the sexual status quo. But it was hard for those turning to the decision to agree on what a new sexual culture should involve. The stalled quest for sexual liberty exposed lingering ambivalence about the culture of individual rights and free markets that seemed ascendant in the 1970s. While promoting a right for adults to have consensual sex, activists, attorneys, and lawmakers held conflicting ideas about what made a choice free rather than coerced. Particularly in the context of intimacy, movement members also defined private conduct differently, clashing about which forms of nonmarital relationships should be seen in public, celebrated by society, or recognized by the state. Although *Roe* could stand for privacy or choice, those challenging existing laws disagreed on the relationship between the two and the meaning of each one.

The ACLU Sexual Privacy Project

In March 1973, ACLU attorney Marilyn Haft unveiled plans for a new court-centered challenge to regulations of consensual adult sex. At the time that Haft was writing, privacy claims had already played a part in efforts to transform the laws governing sexuality. Before 1960, groups advocating for the rights of gays and lesbians, including the Mattachine Society and the Daughters of Bilitis, used privacy arguments. In the 1960s, the leaders of these organizations often shifted focus, playing up demands for equal treatment. Just the same, throughout the 1960s, privacy rhetoric mattered. For example, when the Mattachine Society defended gay employees who lost civil service jobs, the organization argued that "[p]rivate, consensual sexual acts . . . between adults . . . are not, under any circumstances, the proper concern of the employer." In a 1967 policy statement, the ACLU used similar rhetoric when calling for the decriminalization of sodomy. The group's policy statement proclaimed that "the right to privacy should extend to all private

sexual conduct." In 1969, before New York repealed its restrictions on legal abortion, Roy Lucas, a leading litigator in the reproductive-rights movement, similarly argued that "various provisions of the Bill of Rights created a right to marital and sexual privacy."[9]

In the 1970s, some project members made familiar arguments. But for others invoking *Roe,* sexual privacy came to mean very different things. Marilyn Haft set up the project with the help of ACLU attorney Mel Wulf and Arthur Cyrus Warner, a law professor and activist. The trio pitched the idea of a sexual privacy project to the Playboy Foundation. For Warner, the project formed part of an incremental effort to use the courts to chip away at sodomy bans.[10]

Haft first took an interest in the treatment of minority groups when she was a child attending yeshiva. When her teacher brought the class to view films on the Holocaust, Haft still recalls thinking that nothing like that should ever happen again. Over her parents' objection, Haft became one of thirty-three women in her class at New York University School of Law. After a stint at a tax firm, she began working as a volunteer at the New York Civil Liberties Union and later became a paid staff attorney at the national organization. Between 1970 and 1973, Haft immersed herself in prisoners' rights work, but she hated that trials rarely generated the kind of record that allowed her to raise constitutional issues on appeal. Haft decided that she wanted to be a trial attorney, and she thought that the gay-rights movement would need a lawyer badly enough to let her learn on the job.[11]

Haft believed that *Roe* would help build momentum for a broader attack on laws criminalizing consensual sex, but she and her allies did not stick closely to what the *Roe* Court had said. The ways in which project members used the decision help explain how and why thinking about a right to sexual privacy changed.

Both Warner and Haft saw gay and lesbian rights as the focal point for the project, but a broader privacy frame, particularly one connected to *Roe,* served important strategic purposes. First, Haft still recalls that, within the ACLU, key leaders questioned whether a campaign for gay rights would come across as discriminatory against heterosexuals. Expanding the initiative to cover prostitutes, fornicators, adulterers, and other consenting adults allayed this concern. Second, while several *Playboy* pieces had expressed support for gay liberation, its publisher Hugh Hefner and his colleagues seemed

more likely to fund an effort to protect all consensual sex. The Playboy Foundation partly funded Haft's effort and named her as the project's leader.[12]

With the foundation's support, the Sexual Privacy Project lobbied for new laws, streamlined public-education programs, and worked with a loose network of attorneys litigating cases in the state and federal courts. Haft wrote to ACLU chapters and affiliates that the recognition of a universal right to sexual liberty was both realistic and necessary. "The time is particularly ripe to challenge these laws and patterns of discrimination as a result of . . . the recent landmark extension of the constitutional right to privacy by the Supreme Court in the abortion decisions," she argued.[13]

Haft saw criminal laws on solicitation and loitering as key to the oppression of sexual dissenters. But how would the project identify consensual sexual acts, especially if bystanders objected? Who needed to consent—the parties to a sexual relationship or any member of the public observing public displays of affection? And what was the goal of advancing a right to make sexual choices? In tackling these issues, Haft and her colleagues often used privacy arguments without mentioning *Roe*. But the Court's decision was an important source of raw material. Popular reinterpretations of *Roe* illuminated connections between privacy and freedom of choice only hinted at in the Court's original opinion. Because of the potential relationship between these two constitutional ideas, Haft could invoke *Roe* strategically, both by relying on existing precedent and by dramatically expanding its potential reach. Nevertheless, when making *Roe* part of a set of related claims, project attorneys had to work through difficult questions about the relationship between individual privacy and a right to choose. Should the project prioritize the defense of purely private behavior, or should the project argue for the legitimacy of certain forms of public conduct? Over the course of the decade, these questions gradually divided the coalition that Haft had helped to build.

Questions about the aims of the project first shook the ACLU itself. At a winter 1974 meeting, Haft presented a proposal calling for the decriminalization of prostitution. Members of the organization's Due Process Committee wondered whether the state had good reason to outlaw commercial sex or solicitation, at least under certain circumstances. Committee members pointed out that bystanders, including minors and parents, do not consent to seeing prostitutes on the streets hunting for clients. If the project

prioritized privacy, did the rights at stake apply only to what happened behind closed doors? Or should the Constitution require tolerance for the public behavior of those who made controversial sexual decisions? In the face of intense conflict, the committee could at most agree that "[p]aying someone to sleep with you is not a crime."[14]

Following the meeting, Haft responded that any meaningful right to make sexual decisions required some protection for public behavior. First, as Haft explained, antisolicitation laws allowed the police to punish any woman expressing herself sexually. Haft reminded committee members that the law justified not only the arrest of sex workers but also all women "who looked like prostitutes to the police." She called on her colleagues "to remove the stigma of criminality" surrounding sex work, not just to stop the state from interfering with what went on behind closed doors.[15]

Haft encountered similar resistance when she pushed for a separate ACLU policy on the rights of gays and lesbians. Again, the issue of public versus private conduct—and the relationship between choice and privacy—provoked disagreement. The dispute began after Haft wrote ACLU leader Norman Dorsen that the organization could make great progress in undermining criminal prohibitions on sodomy. Mentioning *Roe*, Haft argued that "the Supreme Court's expanded notions of an individual's right to privacy in terms of autonomy, or the right to make personal choices in lifestyles free from government intrusion, indicates even greater possibilities of legal changes for homosexuals in the courts."[16]

Several times the following winter, after Haft brought the issue up for consideration, the ACLU Due Process Committee deadlocked on her proposal. Committee member Peter Strauss argued against a specific policy for gays and lesbians. In his view, the organization could do more than enough by endorsing sexual privacy for all consenting adults. He warned that going further would put the group at risk of being "beholden to [a specific] group." For Strauss, privacy rights did not need to focus so heavily on who deserved a right to make sexual choices. Haft replied that any effort to convert the policy into a general one on sexual privacy would be "outdated and offensive," since gays and lesbians "suffered greater discrimination," particularly after coming out of the closet. As she envisaged it, a separate policy would endorse not only privacy for consenting adults but also respect for gays and lesbians who had come out of the closet.[17]

Ultimately, by the spring of 1975, the committee had adopted resolutions on both prostitution and gay rights that reflected many of Haft's earlier demands. However, the committee's debate foreshadowed disagreements that would haunt the coalition Haft and her colleagues had begun to forge. Those who endorsed a right to make sexual choices disagreed about whether to protect public identity as well as private behavior. At the same time, when advocates defined consent, their views about the desirability of some forms of nonmarital sex inevitably shaped the debate. Haft could point to *Roe* in speaking to those with differing views about the scope and purpose of a right to sexual privacy, but the underlying disagreements about the meaning of such a right remained intractable.[18]

While questions surrounding the definition of sexual privacy remained, Haft's initiative attracted a diverse group of partners, including feminists, sex workers, and proponents of rights for gays and lesbians. Those affiliated with the Sexual Privacy Project blitzed the media, petitioned the American Bar Association (ABA) to endorse the legalization of prostitution, held rowdy fundraisers, and brought legal challenges. In California, Oklahoma, and New York, attorneys affiliated with the project challenged the sodomy convictions of gay men. In Colorado and Hawaii, lawyers questioning the constitutionality of solicitation laws represented sex workers, leaders of gay-liberation groups, and men arrested in the middle of peep shows.[19]

Lawyers working in Texas, Missouri, Kentucky, and North Carolina questioned cross-dressing laws, arguing that they violated a "right to privacy [that] includes a right to choice in personal appearance and sexual orientation." In New Jersey, affiliated attorneys questioned the fornication convictions of both a man accused of raping a prostitute and a woman who frequently "star[red] in obscene motion pictures." While challenging employment discrimination against gays and lesbians, attorneys aligned with the organization also represented a commune questioning a zoning ordinance, a woman denied auto insurance because she was living with her boyfriend, and a bus driver fired for having a child out of wedlock. Across the country, between 1973 and 1977, lawyers tried to use the Sexual Privacy Project as an opportunity to dismantle many of the nation's morals regulations.[20]

The project provided one of several opportunities for collaboration between civil libertarians, feminists, gay and lesbian activists, and sex workers opposed to the current regulatory scheme. In 1973, working with the

project, COYOTE participated in the first of several class-action lawsuits challenging bans on the solicitation of prostitution. Some members of NOW belonged to COYOTE, represented the latter in court, and worked together on pamphlets calling for the decriminalization of prostitution. Leaders of the National Gay Task Force (NGTF, later the National Lesbian, Gay, Bisexual, Transgender, and Queer Task Force) joined COYOTE protests. As early as 1973, the project worked to challenge the constitutionality of New York's sodomy ban. These struggles helped to cement a sometimes-troubled relationship between feminists, civil libertarians, and gay and lesbian activists working on the cause.[21]

Notwithstanding several setbacks, these groups won key victories in court. In the political arena, grassroots activists used the right to privacy to lobby and popularize a way of thinking about current sexual mores. Whether or not Americans accepted the changing landscape of sexual behavior and identity, a variety of groups effectively argued that sex was no longer the government's business.

The National Organization for Women and the Right to Control One's Body

Chris Riddiough felt that it was almost inevitable that she would join the fight for a woman's right to control her own body. A "political junkie" for as long as she could remember, Riddiough grew up watching Democratic National Conventions on television. She attended her first rally in support of John F. Kennedy before starting college. When she read Betty Friedan's *The Feminine Mystique*, she thought that it was "the best thing since sliced bread." But it was not until after moving to Chicago for graduate school that Riddiough finally became politically active. In the early 1970s, she began working on issues of gay and lesbian rights and became a leader of both the Chicago Women's Liberation Union and the Illinois affiliate of what was then called the National Gay and Lesbian Task Force.[22]

Before long, Riddiough had taken on leadership positions in national feminist organizations. Her path to national NOW began with her work to ratify the Equal Rights Amendment in Illinois. In the early 1980s, the organization's vice president of action, Mary Jean Collins, asked her to move to Washington, DC, to coordinate NOW's first major lesbian-rights initiatives.

She oversaw pilot projects designed to introduce protective state-level legislation and lobbied at the national level for civil-rights legislation for gays and lesbians.[23]

Through her work, Riddiough got caught up in a debate over how to describe sex and sexuality. Some feminists wanted to describe sexuality as a choice. Lesbians were tired of being told that they "could not catch a man." Rather than viewing lesbianism as "second best," some feminists insisted that they freely and happily chose same-sex partners. Others saw sexual orientation as a better way of framing the issue, since most people believed that "if you had had a choice about being gay, then why not change?" Choice arguments initially gained support because they spoke to feminists' interest in creating a coherent agenda. Fighting for a right for women to control their own bodies made tremendous sense because "women's sexuality fed into both reproductive issues and . . . gay and lesbian issues."[24]

At the time that NOW members like Riddiough debated the boundaries of a right to control one's body, sexual mores were in tremendous flux. A 1969 Gallup poll found a striking acceptance of premarital sex among college students. Four years later, less than 30 percent of those under the age of thirty saw sex before marriage as objectionable.[25]

The reality of the sexual revolution disappointed many of those who later joined the women's liberation movement. In consciousness-raising sessions in cities across the nation, women discussed the ways the revolution had left them out. While feminists debated what a healthy and equal sexuality would involve, many in the women's movement denounced the sexual changes celebrated in the press. The first issue of *Ms. Magazine* published in 1972 went so far as to declare: "The Sexual Revolution Wasn't Our War."[26]

Nonetheless, the leaders of many feminist organizations saw sexuality as the key to understanding women's struggle. Lesbians had long participated in the women's movement, but the hostility they encountered sparked the development of a new political theory of heterosexuality. Betty Friedan, a founding member of NOW, had famously described lesbianism as a "lavender herring" used to discredit the women's movement. Self-identified lesbians responded that a rejection of heterosexuality should be one of the cornerstones of any meaningful feminist movement. As activist Charlotte Bunch explained in 1973: "[O]nce you become a lesbian, you discover . . . that you

are not, in fact, dependent on men at that basic irrational level you once thought you were."[27]

Notwithstanding the influence of activists like Bunch, feminists rarely agreed in the early 1970s about how to move beyond what some saw as compulsory heterosexuality. Some argued that lesbian separatist solutions went too far, ostracizing women who were still involved with men. Feminists who had identified as lesbians before the rise of the women's liberation movement sometimes questioned the commitment of those who chose same-sex relationships for political reasons.[28]

This lack of cohesion helped to fuel the rise of what historian Alice Echols calls cultural feminism, a movement to invert a social hierarchy that devalued women. Jane Alpert, a leading theorist of cultural feminism, had gone underground for years because of her ties to a former lover, Sam Melville, who had been convicted of several bombings of federal buildings. After Alpert came out of hiding, she penned an account of her disillusionment with the male-dominated Left. Her work "Mother Right" posited that what united women was not compulsory heterosexuality but rather "a culture and a consciousness that is common to . . . women." Highlighting the biological differences between men and women, Alpert favored a new, matriarchal culture based on "the capacity to bear and nurture children."[29]

NOW members also found themselves caught in the middle of a debate between feminists about how to reform the law on prostitution. In the early 1970s, when cities like New York and San Francisco considered changing their laws on prostitution, feminists from Susan Brownmiller of the Radical Feminists to Del Martin of San Francisco NOW pointed to the double standard that so flagrantly applied to prostitution arrests. Both Brownmiller and Martin decried the discriminatory enforcement of laws against female prostitutes while men got away scot free. Beyond the attack on the double standard, however, any consensus broke down. Brownmiller resisted efforts to characterize prostitution as a victimless crime, describing prostitution as an extension of the oppression of women. While recognizing the dangers then facing many sex workers, other activists insisted that there was nothing inherently oppressive about a woman's decision to sell sex.[30]

To unify those with conflicting perspectives, NOW members in the mid-1970s turned to a right to control one's own body tied to the *Roe* decision.

The organization had begun emphasizing a right to control one's body before 1973. In November 1967, when Betty Friedan and her allies introduced a resolution in favor of abortion repeal, Friedan made clear that the board would focus partly on "the right of every woman to control her sexual life." Neither Friedan nor the official resolution explicitly tied this constitutional right of self-control to the idea of privacy articulated by the Supreme Court in *Griswold* or earlier decisions. Nevertheless, the proposal appealed to a majority of NOW members. One supporter argued for the resolution as part of a larger effort to achieve intimate pluralism, calling abortion rights "part of the sexual revolution." Alice Rossi, another proponent, also endorsed rights to both sexual intimacy and reproductive liberty. "If no harm will come of it, people should be free to . . . choose premarital relations," Rossi asserted. After NOW ultimately adopted the resolution, some members of the group worked to make the right to control one's body synonymous with interests in both sexual and reproductive liberty.[31]

On the right to control one's body, the *Roe* decision delivered only some of what NOW members had hoped for. In striking down most of the abortion laws on the books, the Court distanced itself from feminist rhetoric. *Roe* also repeated that women would exercise abortion rights in consultation with their doctors. Nevertheless, *Roe* did implicitly connect privacy to constitutional interests in autonomy, control, and self-determination. The Court emphasized "[t]he detriment that the State would impose on the pregnant woman by denying [her] choice."[32]

Seeking to expand on the Court's decision, NOW members described the opinion as a vindication of women's, rather than physicians' and patients', rights. NOW leaders also more deliberately ignored any distinction between the privacy mentioned in *Roe* and a right to control one's body. After the Supreme Court announced its decision in *Roe*, NOW members, including President Wilma Scott Heide, described the decision as a victory for "the right of a woman to control her own body."[33]

A month later, at NOW's national conference, with little discussion, the group adopted three resolutions that would help define the organization's approach to sexuality. The first called for the decriminalization of prostitution while insisting that it was "not a moral good." At the same conference, NOW endorsed rape-law reform and lesbian rights. Over the course of 1973, in elaborating on this new sexual agenda, the organization looked to the right to

choose in articulating the common needs of women across legal issues and lines of race, class, and sexual preference. If adults had a right to control their own bodies and engage in private, consensual relationships, then NOW members could defend women's right to say yes and no to sex.[34]

Later, when again tackling questions of discrimination against lesbians, members of the group began debating how far *Roe*'s right to control one's body might extend. The group also drew on popular reinterpretations of *Roe* as a decision involving a woman's right to choose. In October 1973, the organization's Task Force on Sexuality and Lesbianism described "a woman's right to choose her own sexuality and lifestyle." Members of the group presented antilesbian discrimination as one of several issues, including sex education, related to women's control of their own bodies. The idea of sexual liberty helped to reassure NOW members anxious about endorsing lesbian rights. If the issue fit in a larger reform platform expanding women's control of their bodies, lesbian feminism represented nothing more threatening than a natural extension of the group's existing commitments on abortion. As the task force argued: "Sexual liberation of a woman means freedom to choose her own sexual preference."[35]

The idea of controlling one's body also animated NOW's campaign to reform rape laws. In September 1973, in response to a spike in reported sexual assaults in the 1960s, Senator Charles Mathias (R-MD) proposed an amendment to the National Mental Health Act that would establish the National Center for the Prevention and Control of Rape. In 1973, to benefit from recent congressional interest in the issue, NOW created a task force to reform rape laws.[36]

Connecting the issue of rape to *Roe* and the right to control one's body allowed NOW members to remake existing arguments for rape-law reform. Mary Ann Largen, the leader of the task force, first hoped to expand the definition of rape to include oral and anal sodomy, redefining the crime in a less gendered or heteronormative way. Internally and through lobbying, task force members also argued for rape-law reform based on the woman's right to control her body that NOW members identified in *Roe*. "Rape is an act of subjugation, humiliation, and violation of the victim," the task force explained in a resolution put before the larger organization. Largen and her colleagues argued that rape violated women's sexual privacy by compromising their bodily integrity and shaming them publicly.[37]

NOW's campaign to reform rape law made headway. Congress twice passed Mathias's bill only to face a veto by President Gerald Ford, who preferred a version of the bill funded by block grants. On a second try, Congress overrode Ford's veto, vindicating NOW's efforts.[38]

In the first half of the decade, NOW leaders seeking to reform the law on sexuality used the idea of a right to control one's body to smooth over differences between members and to articulate a single, coherent reform agenda. The organization described the right to privacy in surprising ways. While defending a right to privacy, NOW members asked for more than freedom from state interference. The organization's agenda made the right to control one's body part of a demand for state protection against private acts of sexual violence.

Below the surface, however, hard questions remained about what that right involved. In part, these latent disagreements reflected the diversity of the organization's membership. Some members shared Susan Brownmiller's concerns about sex work, endorsing free choice in sexual matters while believing that no woman would freely choose prostitution. Others, like pioneering NOW member Flo Kennedy, held positions of leadership in COYOTE. At a time when some NOW members harbored doubts about the wisdom of emphasizing lesbian rights, others, like Sidney Abbott, a founding board member of NGTF, lobbied for a lesbian-rights resolution. For much of the early 1970s, members largely avoided defining the boundary between consent and coercion. As the decade progressed, NOW members would find it much harder to draw a line between the two.[39]

Sex Workers and Stigma

In 1973, on Mother's Day, one of the first sex workers' organizations in the United States issued a press release arguing that "whores [did] not need to be saved from themselves but rather from men who insist[ed] on putting them in jail."[40] Founded by Margo St. James, a self-proclaimed former prostitute, COYOTE stressed "the rights of consenting adults to private sexual activity."[41] In its first months of operation, COYOTE provided legal services for prostitutes and aided in bail hearings. Members of the group hoped to test the constitutionality of bans on prostitution and educating prostitutes about any protection that the Constitution offered. While only sometimes mentioning

Roe by name, COYOTE activists consistently described their cause as an extension of rights to choose already recognized in the abortion context.[42]

COYOTE popularized the idea of constitutional privacy at a time when commercial sex was more visible than ever before, at least in major urban centers. In Detroit, Chicago, Los Angeles, and other major cities, barkers and bright lights made sex shops, peep stores, XXX movie houses, and go-go bars a feature of everyday life. For a brief time, even mainstream newspapers and film critics reviewed pornographic films. Advertisements for the X-rated *Deep Throat* (1972) appeared in the *New York Times*. The film became such a mainstream part of popular culture that at the height of the Watergate scandal, the *Washington Post* chose "Deep Throat" as the code name for its star informant.[43]

However, COYOTE activists presented their cause as involving far more than commercial sex, deliberately blurring the line between prostitution, marriage, and nonmarital sexual relationships. To reinforce the common ground shared by sex workers and other women, St. James first brought COYOTE into partnerships with feminist groups that were focused on other issues. Members of the group pushed for ratification of the Equal Rights Amendment (ERA). St. James also formed a partnership with Wages for Housework, a group lobbying for government subsidized salaries for homemakers. In explaining the alliance, St. James argued that the criminalization of prostitution stemmed from discrimination against women that cut across a variety of legal issues. "Housewives provide sexual services as part of their job, but receive no pay for it," St. James told *Jet* magazine in 1977. "Prostitutes may earn a lot of money, but they don't get to keep much of it." Because of the group's broad focus, COYOTE often appealed to men and women frustrated by a sexual double standard that stigmatized women. In 1974, the group claimed over 10,000 members, only 10 percent of them prostitutes.[44]

While NOW described a right to control one's body that allowed all women to avoid unwanted sexual contact, COYOTE leaders invoked privacy to shine a light on discrimination faced by women and minorities pursuing intimate relationships. COYOTE members sometimes pointed directly to *Roe,* but often activists highlighted the right to control one's body or the right to choose without explicitly referencing the Supreme Court's decision. In any case, COYOTE members described a right to privacy that had everything to do with self-determination.

In the mid-1970s, the organization advanced this agenda by prioritizing a fight against loitering bans. In 1976, during debate about a Seattle ordinance, COYOTE leaders argued that police would use the law against any woman who did not conform to conservative sexual norms. "If you are a woman alone, wearing a mini skirt and high top boots, especially if you're black, you'll be arrested," argued a COYOTE leader. In New York, when legislators passed a tough new law, COYOTE called a "loiter in," asking all women to wear "hot pants and lots of make-up." The culture of sexual liberty some identified in the 1960s still treated many of the sexual decisions made by women and minorities as shameful. Recognizing a right to sexual choice, as COYOTE saw it, meant expanding public tolerance for these disadvantaged groups.[45]

In defending acts of public expression, COYOTE members drew on the ideas of a right to choose or a right to control one's body closely tied to *Roe*, describing each one as the same as the right to privacy. The organization put out brochures insisting that laws criminalizing prostitution, loitering, and solicitation constituted "an invasion of the individual's right to control his or her own body without unreasonable interference from the state."[46] By 1975, COYOTE affiliates in three states spread this claim, and the national group joined the ACLU in challenging the constitutionality of California's prostitution ban, arguing that it was an "invasion of privacy."[47] Outside and inside of court, the group made arguments about a right to control one's body, seeking to persuade the San Francisco district attorney to stop prosecuting prostitutes, shaping the agenda of the feminist conference on International Women's Year in Houston, and lobbying the American Bar Association to adopt a resolution for the decriminalization of "commercial sexual conduct between adults in private."[48]

Notwithstanding the breadth of COYOTE's demands, the leaders of the group found reason to highlight the *Roe* decision and a related right to privacy and to control of one's body. Tying the group's cause to legal precedent helped the group raise money from the Glide Foundation, a left-wing charity focused on antipoverty work, and the Point Foundation, an environmental nonprofit. The group's emphasis on a right to choose sex helped with the recruitment of celebrities and political leaders, including actress Jane Fonda. As ACLU leaders had recognized, prostitutes often avoided the public stage, fearing criminal charges and personal stigma. Advocating for a marginalized population, COYOTE used arguments based on sexual privacy to build rela-

tionships with feminist and gay-rights groups. St. James and her colleagues stood to gain a great deal from claiming common cause with others calling for sexual liberty. As she stated: "A woman's right to her own body [in the context of sexuality] is the same as in an abortion."[49]

Sexual Orientation and Sexual Liberty

COYOTE sometimes cooperated with gay and lesbian groups that had their own reasons for drawing on a right to choose tied to the *Roe* decision. Many of the activists who began working with the movement in the 1970s remember the influence of autonomy arguments. Carmen Vázquez still describes herself as a "child of the 1960s." Born in Puerto Rico, Vázquez grew up surrounded by the antiwar and women's liberation movements in New York City. Although she had a girlfriend in high school, Vázquez did not initially see sexuality as a political issue. But by the end of the 1970s, she had moved to San Francisco and plunged into the city's sexual politics.[50]

Vázquez took part in a heated debate about how to describe sexuality—as an orientation or a choice. On the one hand, some of her colleagues recognized that choice rhetoric implied that gays and lesbians could and should change. In Vázquez's view, choice rhetoric had always been far from perfect: in the context of reproduction or sexuality, it ignored the economic, social, cultural, and biological forces that narrowed the available options for poor or nonwhite women. Nevertheless, in the 1970s, the language of choice at least seemed compatible with the pride so many felt in their identities and relationships. The language of sexual orientation suggested that someone would be a lesbian only if she could not help herself. Vázquez and her allies believed instead that they "had a right to choose to be gay."[51]

Like Vázquez, Tim Sweeney had a hard time imagining a life without social-justice work. He grew up in Montana in a large Catholic family that had always helped the poor. His mother worked as one of the first welfare agents in Yellowstone County, reaching out to migrant workers who had come north to the state's sugar beet fields. Sweeney knew he was gay as early as age six, but his political influences were wide ranging, from the fight for the Equal Rights Amendment to the early work of the environmental movement. After graduating from college, Sweeney flipped a coin in a bar one night to determine whether he would move to New York or San Francisco.

The coin sent him to the West Coast, where he began community organizing and soon started working with Harvey Milk to defeat an antigay statewide ballot initiative.[52]

After winning his first campaign against the odds, Sweeney would spend the rest of his career in the movement "believing that anything was possible." The 1970s also gave him his first taste of debates about the best way to explain what gave gays and lesbians the right to live as they chose. His allies borrowed arguments involving the "right to privacy [and] control over your own body" that he identified with the women's movement. Sweeney would go on to play a prominent role in Lambda Legal and the Gay Men's Health Crisis (GMHC), but at the beginning, he saw how central arguments about self-determination were to the movement. For many, the cause involved the "right to make [one's] own determination about [one]'s life [and one's] body."[53]

Sweeney and Vázquez came into the movement at a crucial time in its development. While gay and lesbian groups had been active since the Cold War, a more confrontational movement took the political stage after the 1969 Stonewall uprising, a series of violent gay-rights demonstrations following a police raid on the Stonewall Inn in New York. Founded the same year, the Gay Liberation Front (GLF) articulated a philosophy that combined openness about sexuality with deep skepticism of prevailing gender norms. Many in the group believed, as member Allan Young put it, that "gay means not homosexual but sexually free." GLF's embrace of sexual freedom figured in the group's larger identification with the New Left.[54]

In 1969, former GLF members dissatisfied with the group's focus formed the Gay Activists Alliance (GAA), an organization that took a single-issue focus rather than positioning liberation in a broader radical agenda. Within a year of its organization, GAA put forward a civil-rights ordinance, Intro 475, that would ban discrimination based on sexual orientation. Although Intro 475 used the language of sexual orientation, GAA had borrowed from feminist arguments for legalizing abortion early on. The preamble to the organization's constitution highlighted individuals' "right to control . . . [their] bodies," "to make love with anyone, anytime, anyway, provided only that such action be freely chosen."[55]

The year of the *Roe* decision witnessed the formation of two groups designed to professionalize the movement. Lambda Legal opened its doors in October 1973 after a protracted court battle about whether the group could

incorporate in New York State. Lambda described itself as the "only organization in existence dedicated primarily to pursuing equal rights for homosexuals through the courts" and "the only gay civil rights organization that is authorized to practice law." In November, NGTF began work, focusing on lobbying the federal government.[56]

Although GAA had argued for a right to control one's own body before *Roe,* the Court's 1973 decision came at a time when allied groups were searching for new ways to frame their cause. That December, when the members of the American Psychiatric Association (APA) reconsidered the categorization of homosexuality as a mental illness, activists hoped to develop an alternative definition. Although psychologists, psychiatrists, and sexologists had long debated the nature of homosexuality, during the Cold War, Senator Joseph McCarthy (R-WI) and his allies politicized the idea that homosexuality was a mental illness. The self-proclaimed homophile organizations founded in the period responded by describing homosexuality as, in the words of the Mattachine Society of Washington, a leading group, "not a disorder, but . . . an orientation not different in kind from heterosexuality." In the early 1970s, GAA gravitated to the language of sexual orientation, but by 1973, NGTF leaders questioned whether such a strategy would hamstring the movement going forward.[57]

In 1973, NGTF members began rethinking the value of sexual orientation arguments when APA members voted to frame homosexuality as a preference rather than a disorder. The APA also passed a resolution endorsing the repeal of all criminal sanctions on the sexual choices made by consenting adults. NGTF members described the move as an unprecedented victory. Since arguments about privacy seemed to have persuaded the APA, related reasoning gained support. At the same time, the civil-rights ordinance proposed by GAA in New York made no real progress, dying in committee in 1972 and 1973.[58]

The setbacks faced in New York seemed instructive. Opponents of the bill played on legislators' discomfort with gays and lesbians' public expressions of affection. In 1974, *Catholic News*, the mouthpiece of the state Catholic conference, charged that the bill would be "interpreted by many as license for uninhibited public manifestations of . . . sexual relationships." Even proponents of the bill recognized the limits of support for rights for gays and lesbians. Making sexual orientation shorthand for a secret, closeted status,

the bill's sponsors introduced an amendment stating that nothing in the definition of sexual orientation would "be construed to bear upon the standards of attire or the dress code."[59]

Disheartened by the New York experience, movement members began looking for an alternative. Some of these activists, attorneys, and mental-health professionals met in Minnesota to develop a model civil-rights ordinance. At first, some of those present "felt that words like . . . sexual orientation ought to be used" because " 'everybody knows what they mean.' " However, others worried that an orientation-based approach would inevitably leave many without protection. As one attendee explained: "Gay people get hassled not for what they do in bed, but for publicly expressing their affection—holding hands, dancing, or even projecting an image which society does not usually associate with 'masculine' or 'feminine' roles."[60]

Ultimately, the attendees settled on a definition first proposed by clinical psychologist Gary Schoener, who favored the language of "sexual or affectional preference." While sexual orientation implied that relationships and identities were "static," Schoener believed that choice rhetoric drawn from a decision like *Roe* better captured the fluidity of sexuality. Attendees also approved of the language of sexual or affectional preference because it dignified the relationships of gay and lesbian couples and highlighted the nonsexual dimensions of those relationships.[61]

Minnesota activists drew on a right to choose taken from the abortion context to overcome the hurdles encountered in New York. First, movement members could draw on a seemingly popular privacy right to defend bold calls for equal treatment and self-determination. By drawing on popular reinterpretations of *Roe* linking privacy and choice, activists could hope to move easily between demands for public acceptance and deference to some legislators' discomfort with homosexuality. By contrast, when ordinances protected sexual orientation, lawmakers claimed a right to punish public conduct. For example, in 1974, in Ann Arbor, Michigan, when prosecutors pursued a lesbian couple observed dancing at a nightclub, local prosecutors denied that they discriminated on the basis of sexual orientation. Assistant District Attorney Edward Pear explained: "It was our feeling that it was their conduct that was unacceptable." In protecting choice, activists hoped that ordinances would reach open expressions of pride and love. The very

language of preference suggested that homosexuality was more than a flaw for which people should not be blamed; it was a valid, defensible choice. At the same time, the idea of sexual preference sometimes elided the distinction between choice and privacy. Activists could switch easily between demands for public tolerance and narrower, but more politically cautious, requests to be left alone.[62]

In Minnesota, local advocates used preference language to mount the first major legal demand for access to marriage for same-sex couples. Jack Baker, a Minnesota attorney and activist, later took the argument for marriage equality to court. Although the Minnesota Supreme Court rejected Baker's argument in *Baker v. Nelson* and the federal Supreme Court dismissed Baker's appeal for want of a substantial federal question, the Minnesota approach played a central role in efforts to dignify committed same-sex relationships. "The right to live as we desire includes the right to love out loud—we will no longer accept mistreatment for loving other people," activists asserted in a pamphlet on the issue.[63]

At the same time, movement members used the idea of a right to choose to appeal to those who did not identify as gay or lesbian. Choice arguments stressed that all Americans had a right to enjoy intimate relationships without government interference. By highlighting a right to control one's body or a right to choose, Minnesota advocates tried to balance the need to appeal to outsiders and ambivalent politicians with a desire to defend public displays of love.[64]

In the mid-1970s, activists in national organizations battled about whether to follow Minnesota in framing sexuality as a right to choose. While some of the cities introducing civil-rights ordinances still used the language of sexual orientation, NGTF leaders ultimately came down in favor of the rhetoric of preference. Initially, some men in the organization worried that highlighting a right to control one's body tied to *Roe* and to the abortion battle would obscure the fact that many felt that they had no choice in their sexual identities. By contrast, lesbian feminists in the group had long favored arguments based on the right to choose. As did many others in the women's movement, these activists saw reproductive rights and sexual oppression as inextricably linked and favored a message that reminded the public of this fact. The language of choice also allowed feminists to describe same-sex attraction as a legitimate

alternative rather than a trait over which no one had control. As late as 1980, NOW defined lesbians as women who had a "primary psychological, emotional, social, and sexual preference for other women."[65]

After some discussion, NGTF members emphasized a right to choose related to *Roe* in campaigns in several states, building toward a federal law outlawing discrimination against gays and lesbians. In 1974, Representative Bella Abzug (D-NY) introduced such a law. At first, Abzug's proposal would have added sexual orientation to the protected classes covered by the employment discrimination mandate of Title VII of the Civil Rights Act of 1964. Minnesota activists urged Abzug to change the bill to cover "sexual or affectional preference." "Holding hands and other public expressions of [a]ffection cost more jobs than private sexual behavior," one of Abzug's correspondents warned.[66]

Bruce Voeller and Sidney Abbott went so far as to travel to Washington, DC, to ask Abzug to change the bill's language. Voeller and Abbott made the case that had convinced many in NGTF. Voeller cited an incident in which police officers had harassed a couple for holding hands. Since these men were targeted because of their public conduct, Voeller argued that "under the phrase 'sexual orientation' it would not be clear that they would be protected from harassment." Voeller suggested that by using privacy and choice synonymously, the movement could legitimize same-sex relationships, demand protection for public conduct, and assuage the concerns of legislators concerned about big government rather than gay rights.[67]

Abzug's proposal became a high point for collaboration between NGTF and other groups committed to some idea of a right to choose. At a press conference on the bill, NGTF members joined leaders of the ACLU and NOW in speaking out against discrimination on the basis of private sexual preferences. The movement's triumph was short-lived. After several attempts, Abzug's bill failed to make it out of committee.[68]

Notwithstanding this setback, NGTF leaders continued emphasizing a right to choose, this time in court. Movement lawyers had experimented with litigation since the early 1970s, representing gays and lesbians in custody disputes, protecting the rights of student groups, and taking on the cause of employees in discrimination cases. Although the movement dealt with a variety of legal issues, sodomy bans had been the prime target. In the mid-1970s, NGTF worked with ACLU board member Philip Hirschkop to orga-

nize a class-action challenge to Virginia's sodomy ban, *Doe v. Commonwealth's Attorney for the City of Richmond*. At trial, Hirschkop turned to a strategy crafted by Marilyn Haft in her own challenge to North Carolina's sodomy ban in *Enslin v. North Carolina*. Hirschkop and his co-counsel, Virginia attorney John Grad, emphasized that the constitutional privacy recognized in *Roe* extended to the intimate, private conduct of consenting adults.[69]

After losing in the district court, Hirschkop and Grad appealed, and Haft asked the Supreme Court to grant certiorari in *Enslin*. However, the Court refused to hear *Enslin* and affirmed the lower court's decision in *Doe* without opinion, dashing any hopes for immediate progress in a federal challenge to sodomy bans.[70]

At least in the short term, the setback represented by *Doe* and *Enslin* only confirmed NGTF's interest in using arguments about a right to choose. In an attack on the 1976 opinion, Bruce Voeller and Jean O'Leary of NGTF argued that the Court had undermined all constitutional interests in privacy. The two activists described privacy and choice as extensions of one another, equally threatened by the Court's latest decision. "[T]he right to one's own body and the right to . . . privacy . . . have been vigorously protected by the Court," the two wrote, pointing to the example of a right to choose abortion recognized in *Roe*. *Doe* "compromise[d] the Court's earlier decisions and should raise great fears." NGTF continued pressing arguments based on freedom of choice after *Doe*, demanding a similar liberty for other dissenters, including prostitutes. O'Leary told the press that her group supported the demands of other organizations, including COYOTE, that called for a right to make sexual choices. "When you talk about sex preference, you must include all women, prostitutes or lesbians."[71]

As Voeller and O'Leary's editorial made clear, arguments based on the *Roe* decision still appealed to a diverse group of activists. While movement attorneys used *Roe* in the courts, grassroots activists also relied on related concepts of choice and privacy in pushing for civil-rights ordinances. These understandings of privacy expanded significantly on what the *Roe* Court had said, and many referred to popular reinterpretations of the decision rather than mentioning the opinion by name. But even when relying on reworkings of *Roe*, activists defined the right to privacy in a strikingly new way, using it to demand tolerance not only of acts of intimacy in the home but also of relationships, identities, and behavior in the public eye.

In the decade after 1973, this strategy delivered some results in the state courts and helped those campaigning for civil-rights ordinances in major metropolitan areas. However, most federal and state courts rejected challenges to prostitution and sodomy laws. Even outside of court, by the mid-1980s, a variety of activists questioned the political value of a sexual-privacy strategy. The push for a right to universal sexual liberty had given way to a conflicted dialogue about which sexual practices deserved legal protection.[72]

Anita Bryant and Save Our Children

A year after NGTF leaders tried to stoke public anger about the Supreme Court's decision in *Doe,* a political fight in Miami forced many to second-guess a strategy based on the right to choose. After the Miami City Council passed a gay-rights ordinance by a vote of 5-3, Anita Bryant, a former beauty queen and gospel recording artist, founded a group dedicated to repealing it. To reach undecided voters, Bryant's Save Our Children organization emphasized that sexual identity and behavior were freely chosen. Save Our Children argued that civil-rights ordinances would simply allow gays to indoctrinate children. As Bryant told the *New York Times* in March 1977: "What these people really want . . . is the legal right to propose to our children that there is an acceptable alternative way of life."[73]

The fight against Save Our Children forced members of NGTF and allied groups to reconsider the relative value of privacy arguments. When Miami voters went to the polls in June, the vote was expected to be close, but after the results came in, gay and lesbian activists were stunned. Miami residents had decided two-one to repeal the ordinance.[74]

NGTF members were frightened by Bryant's success. The group held a strategy session to discuss what had gone wrong, and some concluded that arguments involving choice, privacy, or the *Roe* decision had doomed the fight against Bryant. Others insisted that choice arguments still had potential. Connecting reproductive rights and sexual liberty, one member stressed that "abortion is also a choice." By making the issue turn on a right to choose, Bryant had "connected gay, abortion, [and] ERA issues in the minds of people." Voeller agreed that choice claims resonated with many straight progressives who valued the "strength of diversity."[75]

However, board members, Voeller among them, identified serious costs associated with this rhetoric. Voeller suggested that, at a minimum, NGTF "pull away from 'right to choose' [arguments] in the short term." One member wondered whether identifying something as a choice necessarily meant that it was not a right. Moreover, if Bryant stoked fears about the spread of homosexuality, choice arguments could only exacerbate the problem. "'Right of Choice' is not a rallying point," one board member reasoned. "People [believe that they] have a right to try to prevent children from being homosexual."[76]

In early 1978, as an emerging Religious Right and New Right coalition attacked other civil-rights ordinances, NGTF members saw arguments about a right to choose as a strategic handicap. Often led by local pastors, the new opposition exploited the idea of sexual choice in two ways. First, opponents framed sexual preference as both unimportant and easy to change—not a matter of human rights but simply a lifestyle preference. Second, the opposition seized on the idea that sexual orientation was mutable to play up the threat children faced from exposure to gay and lesbian authority figures. If anyone could choose his sexual preference, teachers could easily convince gullible children to make the wrong choice.

The New Right and Religious Right

When the New Right promised a political revolution, grassroots conservatives tried to make a connection between *Roe* and sexual intimacy into a political trap. By the late 1970s, the grassroots Right projected a new image of conservative politics. With a moderate Republican, Gerald Ford, in the White House, grassroots activists Richard Viguerie, Paul Weyrich, Terry Dolan, Howard Phillips, and others mobilized conservatives angry at the Republican establishment. Although many of these activists had experience in Republican politics, Weyrich promised a political insurrection, led by "radical[s] committed to sweeping changes."[77]

Weyrich and his allies took every opportunity to link gay rights to abortion, since both issues rallied the conservative evangelical Protestants that the New Right hoped to mobilize. This strategy first took shape during the fight against the Equal Rights Amendment (ERA). Phyllis Schlafly, a veteran conservative activist, launched a campaign against the amendment partly by connecting

gay rights to *Roe*. She told supporters that the ERA would entrench abortion and "give homosexuals all the rights of husbands and wives." Schlafly claimed that in either case, ERA proponents used the language of a right to choose to camouflage their true desires. Choice was "the code word for abortion," she alleged, "much as 'different lifestyles' [is] the code word for homosexuality."[78]

In the states, Schlafly, Weyrich, and their supporters not only fought the ERA but also pursued antigay legislation, building on the strategy developed by Save Our Children. In some cases, gay and lesbian activists leveraged the opposition's hostility to reproductive rights to their advantage. In California, advocates worked with feminists to defeat the Briggs Initiative, a bill that would have required the firing of any teacher who "advocated, encouraged, promoted, or imposed" homosexuality.[79]

Generally, however, antigay leaders in the Religious Right and New Right had great success manipulating arguments about a right to choose. In St. Paul, Minnesota, Reverend Richard Angwin, a fundamentalist preacher from Kansas, led an effort to repeal the city's civil-rights protections for gays and lesbians. Angwin consulted with Anita Bryant, ultimately using arguments about sexual choice against supporters of the civil-rights ordinance. "Being a pervert is like being a thief," Angwin explained. "Both are wrong, and both can continue or repent." Angwin's supporters carried the day. St. Paul voted to repeal its ordinance.[80]

Religious Right groups mounted signature petition drives to repeal similar ordinances in Wichita, Kansas, and Eugene, Oregon. Local pastors consistently seized on the idea that individuals freely chose their sexual identities. Reverend Ron Adrian, the head of Concerned Citizens for Community Decency in Wichita, rejected the idea that the ordinance had anything to do with civil rights. "We think it's an effort on the part of a small group of people to ask us to approve their immoral lifestyle," Adrian asserted. Rosalie Butler, a member of the St. Paul City Council, backed Adrian's assessment. "Those who choose a perverted lifestyle, whether it's a homosexual [or] a robber, can't expect the full rights . . . that people who live in step with society get," she stated.[81]

Arguments about immoral choices resonated in Wichita and Eugene as they had in St. Paul. On May 10, Reverend Adrian celebrated a huge margin of victory in Wichita. Barely more than two weeks later, Eugene overwhelmingly voted for repeal. In the wake of the defeats, the media described a

bleak future for supporters of gay and lesbian rights. As the *New York Times* put it in 1978: "[I]t seems likely that few supporters of homosexual rights support them as vigorously as opponents oppose them."[82]

Questioning the Value of Choice Arguments

Between 1978 and 1980, NGTF leaders increasingly questioned the value of arguments based on the right to choose. In the period, internal movement politics left the group on the brink of disintegrating. First, NGTF faced new competition from the Gay Rights National Lobby (GRNL), a group formed in 1976 to focus on lobbying Congress. In 1978, Stephen Endean, a former NGTF board member and a veteran activist, left to become the executive director of GRNL. From the start, NGTF had more money, members, and influence, but with GRNL tapping the same sources of support, NGTF's dominance could no longer be taken for granted. Gay liberationists had long questioned whether NGTF leaders took too apologetic an approach to gay rights, and in the later 1970s, with the Religious Right on the march, challenges from the movement's radical flank intensified.[83]

By April 1978, the *Advocate*, a flagship movement publication, refused to publish NGTF advertisements. Conflict intensified in 1979, after both Voeller and O'Leary resigned. Charles Brydon, a Seattle activist, and Lucia Valeska, a lesbian feminist, replaced them. However, Valeska was poorly known in the movement, and Brydon, known as a pragmatist, hardened the opposition of those who saw NGTF as too conservative. These changes shook both GRNL and NGTF. In 1978, GRNL was running out of money, and NGTF experienced serious budgetary problems and an unprecedented drop in membership renewals.[84]

In the middle of this crisis, movement leaders questioned the value of arguments based on privacy and choice. In April, the NGTF Executive Committee discussed "how to deal with the upcoming referenda and, in general, with the 'new right wing.'" Many present felt that other liberal groups "did not want to deal with the gay issue even though the groups battling gay rights were also battling other [liberal] causes." Committee members proposed more education, and Voeller again highlighted "the need to get conservatives to support gay rights as a privacy issue." But by June, with several losses behind them, those in the movement were angry and disillusioned.

NGTF had already backed away from arguments tied to the *Roe* decision, prompting *Lesbian Tide*, a movement publication, to allege that the organization had abandoned support for the right to choose abortion.[85]

At a meeting discussing the referenda, movement leaders argued that sexual privacy arguments—many of which had served the purpose of aligning gay and lesbian activists with other progressive activists—would make no difference in a world remade by the New Right. "As . . . the right wing's power grows[,] panic will set in," one activist stated. "'The liberals will try to save themselves by remaining silent on issues that don't affect them directly.'"[86]

Contemporary politics stoked these fears. Notwithstanding its sympathy for the movement, the *New York Times* shied away from strong arguments in favor of the rights of gay teachers. As a matter of course, ERA proponents often denied that the amendment would expand gay and lesbian rights. Groups from Common Cause to ERAmerica denied that the amendment would strengthen protections for gays and lesbians. In 1983, members of NOW and the NOW Legal Defense and Education Fund publicly argued that "sexual preference should be protected by the right to privacy" but insisted that the ERA "would not legitimate same-sex marriages."[87]

With left-leaning groups divorcing privacy rights from protections for gays and lesbians, NGTF leaders saw choice arguments as futile at best. As the AIDS epidemic sparked panic, religious conservatives argued that individual sexual freedom of choice had to give way to the public interest in self-protection. In a climate of fear, abstract calls for privacy seemed out of place. At the same time, the epidemic strengthened interest in antidiscrimination arguments. With new examples of bias in the headlines every day, movement leaders had a far easier time criticizing discrimination against members of the community.

The AIDS Crisis

In 1981, the *New York Times* reported on a handful of cases of a rare illness that disproportionately affected gay men. Between 1982 and 1983, the number of patients with AIDS nearly tripled, with almost twenty new cases diagnosed each week. With the rapid advance of the illness, rumors about it ran rampant. In the spring of 1983, *USA Today* ran a story suggesting that people infected with the disease could transmit it by contact as casual as shaking hands.

Hospitals, nursing homes, and hospices refused to accept patients diagnosed with AIDS, as did landlords. United Airlines put two gay flight attendants on leave simply because they might acquire the disorder. Columbia University instituted a policy prohibiting the hiring of anyone with AIDS.[88]

Federal response to the crisis was slow. From June 1981 to June 1982, the Centers for Disease Control spent only $1 million on AIDS, in comparison to $9 million on the less-urgent problem of Legionnaires' disease; and even after Congress voted to increase funding, President Reagan opposed the move. Gay and lesbian activists stepped up to fill the gap left by the federal government and the medical establishment. Alarmed by the spread of the disease, six men from New York City formed the Gay Men's Health Crisis, established a hotline, sent out a newsletter, opened an office, and established a "buddy" program to help persons with AIDS. Similar volunteer programs sprang up within established organizations, including the San Francisco–based Harvey Milk Club and NGTF. A 1983 NGTF survey found that community organizations had budgeted nearly $3 million for AIDS research and support for the current fiscal year and planned to raise nearly $7 million in the year to come. Within one year, GMHC went from hiring fifteen counselors to fielding a team of 175.[89]

The indifference of the government enabled leaders to define their cause more effectively as a fight against discrimination. In the late 1970s and early 1980s, groups like GRNL and NGTF had channeled considerable resources into the effort to document the discrimination gays and lesbians faced. The AIDS epidemic made examples of bias impossible to miss. Conservative writer William Buckley proposed that people with AIDS be tattooed so that others could easily avoid them. Across the country, parents' groups demanded that children who had been infected be expelled from school. In 1985, Representative William Dannemeyer (R-CA) proposed a series of bills that would make it a felony for any person with AIDS to give blood, deny federal funds to cities that did not shutter gay bathhouses, and prohibit persons with AIDS from either working in the health care industry or attending public schools. Even cosmopolitan cities like New York and San Francisco shut down bathhouses rather than prioritizing education about safe sex.[90]

The fear exposed by AIDS gave new credibility to equal-treatment arguments developed by NGTF and its allies. GRNL and other groups had honed these claims in 1980 during a renewed push to amend Title VII of the Civil

Rights Act. Former NGTF leader Jean O'Leary moved away from arguments that presented same-sex intimacy as a logical extension of freedom of choice. Instead, O'Leary argued that gay and lesbian identity was inborn and immutable. As she explained, the proposed civil-rights legislation was not "designed to approve a lifestyle or create a special minority—but simply to prohibit discrimination . . . based on sexual orientation."[91]

When GRNL and NGTF revived the campaign to amend Title VII, choice-based arguments became a staple of the opposition's response. In testifying before Congress, Reverend Charles McIlhenny, a California-based antigay activist, argued that "homosexuality [was] not caused by a constitutional, glandular, hormonal, or genetic factor" but was "a learned behavior." McIlhenny argued that if gays and lesbians made a voluntary choice, they could not be true victims of discrimination. "Granting special legislation to a group because of behavior—let alone immoral behavior—opens the floodgates to any group that wants minority status," he concluded.[92]

National figures in the Religious Right refined these arguments. In condemning a proposed amendment to the Civil Rights Act, Connie Marshner, a close ally of Weyrich's and a leader of the National Pro-Family Coalition, contended that privacy rights militated against protections for gays and lesbians. "What we are advocating," she explained, "is that our right to privacy be respected: That the homosexual lifestyle not be flaunted in our neighborhoods and shouted from the housetops." The opposition made right-to-choose arguments shorthand for the selfishness of which Religious Right activists accused gay men. Civil-rights arguments turned these assertions on their head, insisting that gays and lesbians had no choice about who they were.[93]

The politics of AIDS reinforced the costs tied to arguments involving sexual choice. Judy Welton of Parents United Because Legislators Ignore Children (PUBLIC), a group that campaigned for the expulsion of infected children from public schools, argued against increased funding for research, public education, or drug trials related to AIDS. Welton argued that since gays and lesbians freely choose their sexuality, they put their well-being above everyone else's. "What kind of compassion," she asked, "allows a disease like AIDS to go on, knowing that the causes are selfish, immoral behavior patterns?"[94]

Representative Dannemeyer, one of the most visible antigay leaders, happily discussed the idea of freedom of choice. In response to accusations of

bigotry, Dannemeyer wrote to the *Los Angeles Times:* "Whether the public health response to AIDS should be compromised because of the perceived sensitivities of the male homosexual community, or whether gays should be given 'equal treatment,' comes down to basic value choices in a free society," Dannemeyer stated. "I speak for those who favor traditional family values."[95]

Leaders of NGTF responded that discrimination, not sexual choice, was the real issue. Virginia Apuzzo, the activist charged with revising the organization after the departure of Valeska and Brydon, described AIDS as a "public health crisis [that] has struck minorities who have traditionally been the victims of discrimination." As Jeff Levi, Apuzzo's replacement at NGTF, later explained: "Hiding behind a false mask of concern about public health, there have been efforts to use the fear of AIDS to oppose or repeal civil rights protections for gay men and lesbians."[96]

The epidemic also inspired the development of new equal-treatment arguments based on disability. With federal-disability legislation still several years away, NGTF, Lambda, and other groups argued that AIDS victims suffered from the same kind of discrimination plaguing other Americans battling serious handicaps. The epidemic also forged a new image of gays and lesbians, presenting them not as libertines but as altruistic caretakers. Richard Dunne of GMHC emphasized that "the gay community [had] reached out to those suffering and alone." The easier it was to position gays and lesbians as dignified members of the community, the more effective discrimination arguments became. Moreover, freedom-of-choice arguments no longer captured the movement's new demands for state support, recognition, and respect. Claims based on choice and privacy made less sense as gays and lesbians transitioned, as Tim Sweeney put it years later, "from asking the government to leave [them] alone to asking the government to save their lives."[97]

Gay and lesbian groups downplayed the right to choose partly because of the political hostility sparked by the AIDS epidemic. At the same time, as activists lost loved ones, the idea that anyone could choose a different identity no longer rang true to many in the movement.

While gay and lesbian groups moved away from right-to-choose arguments, feminists who had worked with organizations like NGTF had their own reasons for second-guessing the wisdom of claims about sexual choice. In the later 1970s, the pioneers of rape-law reform turned their fire

on pornography. By the end of the decade, despite considerable dissent, feminists seeking to regulate pornography defined a broader category of nonconsensual, violent sex. On the surface, the pornography wars pitted First Amendment purists against feminists highlighting violence against women. However, the conflict also rekindled the conflict plaguing the broader campaign for a right to sexual choice. While feminists might embrace a right to sexual liberty, they disagreed deeply with one another and coalition partners about the meaning of consent.

The Boundary between Sexual Liberty and Violence

For NOW members, the distinction between consensual and nonconsensual sex drawn in the early 1970s began to break down later in the decade. These fissures appeared when NOW and other feminists took on the cause of Joan Little. In 1974, Little, an African American woman, made national headlines when she escaped from jail after killing a guard who had raped her. Efforts to fight Little's prosecution united the NOW Rape Task Force with prominent lesbian feminists and feminists of color. Her story brought to life the intersecting forms of oppression many activists had condemned.[98]

During her trial, Little's champions questioned the meaning of sexual consent. Prosecutors had alleged that Little had consensual sex with the guard. One of Little's champions, Charlene Mitchell, an African American feminist, responded that consent between Little and her jailer was quite literally impossible. Little's eventual acquittal helped to spread an idea of coerced sex that went beyond conventional legal definitions of rape. Mary Ann Largen, the head of the NOW Rape Task Force, called for an expansion of the definition of sexual assault, explaining: "The trial of Joan Little has reconfirmed the commitment of the NOW National Rape Task Force to legally redefine the crime of rape to include all sexual offenses against women."[99]

As the nation began a debate about the idea of marital rape, the next two years made clear that activists' embrace of a right to choose tied to *Roe* masked sharply different views about which sexual relationships deserved protection. These struggles addressed not only the boundary between private and public conduct but also the distinction between consent and coercion. While feminists in NOW used *Roe*'s right to control one's body to demand more protections against sexual assault, some members of the ACLU Equality Committee

argued in 1976 that in the context of marital rape prosecutors should respect rapists' right of sexual privacy and not bring charges. A year later, the New Jersey Supreme Court struck down the state's fornication ban, explaining that it violated a constitutional privacy right connected to *Roe*. The case involved ACLU attorney Baime's client Charles Saunders, a man originally accused of rape.[100]

Starting in the late 1960s, radical feminists had argued that the kind of sexual choice demanded by Charles Saunders merely excused men's subordination of women. However, NOW and other organizations focused on law reform had used the language of choice, privacy, and control for their own purposes. *Roe* had been an important weapon because the decision gestured to both privacy and self-determination. As the uses of *Roe* show, NOW had made progress partly by avoiding discussion of what authentic sexual choice for women would entail. That debate exploded in the later 1970s and early 1980s, when veteran activists put pornography center stage in American politics.

From the very beginning, feminist groups had criticized the media's representation of women. By the mid-1970s, these attacks expanded. In 1976, a group of West Coast feminists founded Women Against Violence Against Women (WAVAW) to protest depictions of violence against women in advertising and other mainstream media. The same year, in San Francisco, Women Against Violence in Pornography and Media (WAVPM) developed a broader definition of sexual violence. While fighting the explicitly violent images WAVAW targeted, WAVPM members also foregrounded the covert threat some saw in sexually explicit images of women. By presenting women as sexually accessible, passive, and vulnerable, as WAVPM members explained, pornography facilitated sexual violence.[101]

By the end of the decade, however, a group of prominent feminists turned away from the broad-based media reform agenda outlined by WAVAW and WAVPM. Following a 1979 conference at New York University, a group of prominent East Coast feminists, including Susan Brownmiller, Robin Morgan, and Gloria Steinem, organized Women Against Pornography (WAP). WAP received media attention both because of the celebrity of its founders and because of the group's focus on pornography, a hot-button issue. To build on this coverage, WAP members led marches, hosted tours of sex shops in Times Square, and developed a slide show on the harms of

pornography. As part of the group's standard presentation, WAP members explained the difference between pornography, the object of the group's protest, and other forms of erotic speech. Individual members, Steinem among them, had wrestled with this distinction in their writing for several years.[102]

At first, WAP sought to forge alliances with gay and lesbian groups and disavowed the use of obscenity laws to regulate smut. In March of 1980, the group passed a resolution stating that "the prosecution of obscenity laws does not in any way further the fight against sexism in society." Several months later, members adopted a resolution against censorship more broadly.[103]

From the outset, however, the group's definitions of sexual consent and violence proved divisive. Borrowing on radical feminist criticism of heterosexuality, WAP defined a wide variety of sexually explicit materials as depictions of violence. This move immediately provoked controversy. Gay activist John D'Emilio penned an article criticizing the WAP definition in *Christopher Street* magazine. In particular, D'Emilio and other skeptics questioned whether new understandings of consent would play into the New Right's attack on legal abortion and gay and lesbian rights. Lesbian feminist Pat Califia (later, transgender activist Patrick Califia) also questioned WAP's definition of sexual consent. "S / M is not violence," Califia argued. "Wearing a black garter belt is not violence. Being photographed nude is not violence."[104]

In 1983, when WAP endorsed the use of law to ban pornography, conflict about the meaning of sexual consent escalated. By the early 1980s, professor Catharine MacKinnon and author Andrea Dworkin had written extensively about the injuries pornography inflicted on American women. Their ideas gained national attention after the Minneapolis City Council considered a measure that would have rezoned "adult entertainment" venues in the city. MacKinnon and Dworkin spoke out against the zoning proposal, arguing that it condoned pornography. Legislators found MacKinnon and Dworkin's arguments so convincing that the city council asked them to draft an anti-pornography ordinance. The pair proposed an amendment to the city's antidiscrimination ordinance that defined pornography as a "form of discrimination on the basis of sex." Dworkin and MacKinnon set out many categories of behavior covered by the definition, including images of women presented in "scenarios of degradation."[105]

While many focused on the First Amendment implications of the statute, some feminists described it as an attack on the freedom to control one's own

body many tied to *Roe*. Councilwoman Barbara Carlson argued that the ordinance would "take . . . away [her] right to choice" in sexual matters. When women claimed they enjoyed sadomasochistic sex or other acts that the ordinance defined as pornographic, MacKinnon, Dworkin, and their allies argued that oppressed women rationalized their situation by claiming to have chosen it.[106]

The fate of the Minneapolis ordinance and others like it remained uncertain for months. In January, Minneapolis mayor Don Fraser vetoed the ordinance, and a month later, the city council voted 8-5 to sustain the veto. Antipornography feminists turned their focus elsewhere. In May, the Indianapolis City Council easily passed an ordinance patterned on the Minneapolis law drawing on the support of Religious Right leaders in the community. Reverend Greg Dixon, a local member of the Moral Majority board of directors, stated that the ordinance was part of an effort to create "a more moral, Christian society." In October, members of the county legislature in Suffolk County, New York, considered an identical measure, again uniting social conservatives and allies of WAP.[107]

As debates about antipornography ordinances continued in Los Angeles and Suffolk Counties, feminists continued to fight about the definition of consensual sex. Influential activists, including Carol Downer, a pioneer of the women's health movement, lesbian feminist Del Martin, and Julia London, an influential figure in the West Coast movement against violence against women in the media, opposed the spread of antipornography ordinances. Nan Hunter, a feminist and a leader in the gay and lesbian rights movement, founded the Feminist Anti-Censorship Task Force to challenge the dominance of antipornography views in mainstream organizations like NOW. Hunter argued that antipornography feminists had made the concept of sexual coercion dangerously vague. "To some it means sex outside of marriage," Hunter explained, "to some it means sex outside of a very dense kind of matrix of personal associations, to some certainly it means any kind of gay or lesbian sex."[108]

In the summer of 1985, while a presidential commission steered by conservative attorney general Edwin Meese III held a series of hearings on pornography, antipornography feminists faced a setback in the courts. The Supreme Court upheld without opinion a lower court decision concluding that the Indiana ordinance violated the First Amendment. Several months

later, however, the Meese Commission released its findings, drawing a causal connection between pornography and a variety of criminal acts.[109]

The Meese Commission's investigations launched a deeper discussion of when sex harmed women. NOW leaders, including several successive presidents, had taken antipornography positions, but members of the group found themselves divided. Before the commission issued its findings, NOW scheduled hearings on the issue in six cities across the nation. Some urged NOW leaders to stay away from broad definitions of nonconsent. Pointing to disunity on the issue, member Ann Snitow testified that NOW should take no official position. Gayle Rubin, a longtime opponent of the antipornography wing of the movement, called on NOW to discard its opposition to pornography and focus on "the repeal of obscenity laws, . . . the rights of sexual minorities . . . and the legitimacy of human sexual diversity."[110]

However, most witnesses at the NOW hearings adopted a far broader definition of coerced sex. Dolores Alexander, a prominent NOW member and founder of WAP, insisted that the acts depicted in pornography violated a woman's right to control her own body. "If I cannot own my body, who am I?" she asked. "In my view, I am a slave." Another NOW member echoed Alexander's concerns. "If the definition of pornography is not changed," she asked, "how can we discuss our sexual liberation?"[111]

Ultimately, the antipornography faction made more of a mark on NOW leadership. After the Meese Commission released its findings, President Eleanor Smeal issued a press release, mostly approving of the commission's approach. While distinguishing NOW's position from the one taken by leaders of the Religious Right, Smeal endorsed the argument that pornography produced violence and should be regulated by an ordinance of the kind drafted by MacKinnon and Dworkin.[112]

While Smeal's statement hardly put an end to feminist disagreement about the meaning of consensual sex, it sent a powerful message about how far many feminists had moved away from the alliance that had championed a universal right to sexual liberty. To be sure, in the late 1960s and early 1970s, feminists had contested the definition of consent. But within organizations like NOW, feminist legal reformers used the right to control one's body to articulate an agenda that appealed to women with different views of heterosexuality, lesbian rights, and the sexual revolution. Allies invoked privacy, choice, and the *Roe* decision, often acting as if the three could be used

interchangeably. But it became clear that those working to change the law meant very different things when they invoked a right to sexual privacy. Cracks in the partnership between feminists, civil libertarians, and gay and lesbian activists were visible from the very start. As the decade wore on, it became clear that sexual freedom for consenting adults meant something very different to the movements endorsing it.

By the mid-1980s, arguments about sexual privacy had a far more modest reach than many might have imagined in the 1970s. Advocates used them primarily in court, hoping to benefit from the fact that the Supreme Court still treated *Roe v. Wade* as good law. When civil libertarians and gay and lesbian activists brought the constitutionality of sodomy bans to the Supreme Court, privacy arguments still took center stage. Even after the Court upheld the constitutionality of a sodomy ban in *Bowers v. Hardwick* (1986), NGTF members saw great value in arguments connected to *Roe*. Shortly after the decision of *Bowers,* the organization launched the Privacy Project, an effort to repeal remaining sodomy bans and to organize affiliates in a broader variety of states. The project failed to secure the repeal of any laws but sparked new grassroots interest. Ironically, however, the work of the Privacy Project convinced an even larger group of activists that arguments about sexual privacy sometimes did more harm than good.

Bowers and the NGTF Privacy Project

In March 1986, the Supreme Court addressed the constitutionality of sodomy bans. Activists hoped to build on favorable privacy precedents, including *Roe*. Indeed, the Court was hearing an appeal of a decision issued by the Eleventh Circuit striking down a Georgia sodomy law on privacy grounds.[113]

Three months later, when the Court issued its decision, the hope that activists had placed in a privacy strategy seemed misplaced. In a 5-4 decision, the Court rejected the challenge to the Georgia law, reasoning that any argument for a constitutional right to sodomy "was, at best, facetious." Ironically, in the short term, members of NGTF responded with a strategy centered more than ever on privacy.[114]

Launched in 1986 and led by activist Sue Hyde, the NGTF Privacy Project served a dual purpose. Project leaders planned to roll back the remaining sodomy restrictions in the states. The group united NGTF and Lambda with

other progressive organizations invested in the right to privacy, including the ACLU, the National Abortion Rights Action League (NARAL), and the Planned Parenthood Federation of America. Some initially considered a constitutional amendment safeguarding the right to a "lifestyle of one's choosing." Recognizing that it would be all but impossible to ratify such an amendment, coalition members wanted to lay out a vision of what defined their shared "long-range vision of public policy." However, most believed that a solution had to be found at the state level. Some favored a state constitutional amendment built around *Roe* and related cases recognizing a "right to privacy for all lifestyles, or a right to bodily sovereignty." Coalition members believed that such an amendment could win support from outside groups, particularly those unwilling to vote on a more "volatile" issue like sodomy. Ultimately, however, the Privacy Project focused on an incremental effort to repeal the laws already on the books.[115]

In a handful of states, including Minnesota and Maryland, the climate for sodomy repeal seemed promising. In many other states, where hostility was more intense, project leaders simply hoped to jumpstart organizing. NGTF leaders framed their cause in terms of a *Roe*-related right to privacy for two independent reasons. First, the project directly rejected the basic premises of the *Bowers* decision and wanted the public to know. Second, and more important, as director Sue Hyde still puts it, members believed that "legislators and voters would be more amenable to a privacy argument than . . . a sexual freedom argument." As had activists in the 1970s, project workers used *Roe* and the right to privacy to balance conflicting commitments. Invoking a right to choose would bring abortion to mind and help strengthen the support of allies who endorsed reproductive rights for women. Choice rhetoric resonated with those demanding liberation, but by tying her cause to privacy and to the *Roe* decision, Hyde planned to convince more legislators to take her side.[116]

Hyde tested this approach in April 1987 when Minnesota state legislator Donna Peterson proposed a law that would repeal criminal prohibitions on sodomy and other private sex acts. When the legislature took up the bill, religious conservatives packed the hearing room. Many of them held placards claiming that repealing the sodomy law would cause the AIDS epidemic to spread like wildfire. In testimony, opponents went into graphic detail about the nature of gay and lesbian sex. Joined by representatives of Concerned

Women for America, Wayne Olhoft, the leader of the religious Berean League, asked legislators to imagine "ten or twenty men crawling all over each other, using every orifice of their body." Ohlhoft's approach seemed effective. Although the state senate advanced the bill, it died in committee in the house. That spring, a Maryland bill also went down in defeat.[117]

The setbacks in Minnesota and Maryland fundamentally changed the way project leaders viewed privacy arguments that some connected to *Roe*. A rhetorical agenda focused on choice and privacy had gained adherents because it seemed likely to convince ambivalent politicians. When this strategy failed to deliver, project members saw value in a more confrontational approach. In the fall of 1987, for example, the renamed National Gay and Lesbian Task Force (NGLTF) played a central role in both a march on Washington, DC, and a week of nonviolent civil disobedience. A privacy message, intended to address discomfort with gay identity, failed to capture the movement's newfound boldness. Moreover, as Hyde argued, neither privacy nor choice arguments were working. In a fall 1987 workshop, Hyde urged her colleagues instead to develop an "understanding of how sexuality could be discussed in the public sphere."[118]

In 1989, after the project launched a National Day of Mourning for the Right to Privacy, Hyde elaborated on this argument during a town hall meeting in Rochester, New York. She worried that if the movement relied too much on choice and privacy claims, it would never achieve real equality. How could gays and lesbians expect equal treatment, she asked, "when not one word was spoken about the dignity, the naturalness, the normality or the loveliness of gay and lesbian sexuality[?]"[119]

By 1990, the project had revamped its rhetorical strategy. In Georgia, project activists demanding repeal of the sodomy law arrived at the legislature with a brass bed and blow-up dolls simulating gay and lesbian sex acts. At another Georgia protest, activists lay in the street kissing and embracing. In her testimony, Hyde took aim not at privacy violations but what she called "the unpardonable offense of defining [gays and lesbians] as a sexually criminal class of citizens."[120]

The Privacy Project's change in rhetoric also reflected new faith in a constitutional strategy based on the Equal Protection Clause. While *Bowers* seemed to foreclose a privacy argument in the near term, gays and lesbians could still argue that they had been the victims of unconstitutional

discrimination. Under the Equal Protection Clause, courts more closely scrutinize laws that seem to classify people on a suspect basis—in effect, when the classification of a group suggests that it has been subject to discrimination. To establish that a classification is suspect, in turn, a group often had to show that it had endured a history of discrimination, that members had an immutable or highly visible trait, and that group members were politically powerless. Describing sexuality as an unchangeable, immutable orientation seemed to strengthen the movement's equal-protection case. For this reason, activists believed that they were justified in playing down right-to-choose contentions in the courts as well as in politics.[121]

Although it failed to repeal any sodomy laws, the Privacy Project had briefly reunited civil libertarians, feminists, gays, and lesbians invested in expanding sexual liberties. Ultimately, however, the project convinced many, Hyde among them, that sexual privacy arguments, including those based on the *Roe* decision, would not advance the movement's agenda. "Privacy arguments fail to support the repeal of criminal sodomy laws that stigmatize and criminalize people who have no recognized right to privacy," Hyde wrote her colleagues at NGLTF. "[Only when] gay and lesbian sexuality is not untouchable and indefensible will we make lasting change."[122]

The Separation of Reproduction and Sexuality

By the early 1990s, the right to choose served as shorthand for reproductive decision making rather than sexual self-determination, but it was not always that way. For over a decade after 1973, civil libertarians, feminists, sex workers, and gay and lesbian activists made the *Roe* decision a weapon in the struggle to decriminalize consensual adult sex. Sometimes, movement members mentioned the *Roe* decision by name. Often, however, activists referred instead to popular reinterpretations of the decision, spotlighting a right to choose or a right to control one's own body. In both cases, focusing on a right to sexual choice benefited members of this coalition by obscuring disagreements between allies and connecting radical demands to established law and constitutional tradition.

Coalition members used the right to privacy in unconventional ways. COYOTE criticized bias against the sexual expression of women and minorities. Feminists in NOW invoked the right to control one's own body to de-

mand both freedom from government meddling and protection from private violence. Activists working in gay and lesbian groups pointed to the same right in building tolerance for relationships and conduct rather than purely private behavior.

However, the movement made only halting progress and ultimately unraveled. Erstwhile allies held disparate beliefs about which sexual relationships deserved sanction, recognition, and protection. The splintering of the coalition revealed the limits of an emerging culture of individualism. Although many argued that the government should no longer interfere with Americans' intimate relationships, even supporters of sexual liberty could not agree on what made sex either consensual or private.

The story of Charles Saunders, Alan Silber's client, encapsulates some of the problems with calling for a right to choose sex. Charles Saunders was African American and, in Robert Baime's words, "your usual semi-wild kid." When Baime took on his case, however, Saunders was in serious trouble, facing a rape accusation that could land him in prison for thirty years. As he prepared for trial, Baime found out that Saunders's accusers had been arrested on prostitution charges, and he planned, as he put it, to "dirty up the victim." However, the judge charged the jury that they could convict Saunders of the lesser included crime of fornication, and that is precisely what they did.[123]

Saunders's story illustrated the dark side of calls for freedom of sexual choice. A year after the New Jersey Supreme Court decision, Baime received another phone call from his family friend. Charles Saunders had been accused of rape again and needed legal assistance. Baime's wife convinced him not to take the case, and Baime never learned what happened to Saunders.[124] In stories like his, the line between choice and coercion, like the line between private and public conduct, was not always easy to draw.

3

Mental Illness and the Right to Refuse Treatment

In the 1970s, after the American Psychiatric Association stopped treating homosexuality as a disorder, issues about the treatment of the mentally ill caught fire. Many of those who had experienced the system firsthand joined a movement to change it. Don Weitz first dealt with the realities of mental health care as a young man in the 1950s. Like many of his Dartmouth classmates, he did not know what to do with the rest of his life. He often clashed with his parents, sometimes "speaking out against [their] values." Weitz's parents decided that something was wrong with him and sent him to a mental-health facility, but he continued to rebel. He refused to attend some mandatory meetings and eventually had a verbal altercation with one of the staff. Because of the fight, psychiatrists sent Weitz to McLean Hospital, where he received over one hundred insulin-shock treatments. In 1953, after a fifteen-month stay, Weitz left McLean, finished his studies, and eventually became a psychologist. He did his best to put his experiences with the mental-health system behind him, but after starting work, he witnessed patient mistreatment at another facility. Later, Weitz joined a movement of former mental patients opposed to the very idea of psychiatry. As he

still puts it: "I rebelled against authority and my parents, and for that, they tortured me."[1]

Like Weitz, Wendy Kapp entered the mental-health system when she was young. Until her family's insurance ran out, she stayed in private institutions and received "every diagnosis in the book." Often chained to the bed or forcibly medicated, Kapp was technically a voluntary patient but never signed herself out, fearing that she would be committed to a public facility. When her family could no longer afford her care, she landed at Illinois State Hospital, where she was eventually diagnosed with bipolar disorder. After being forced to take medication, she was eventually released from the hospital and told she would need Lithium for the rest of her life. Although she got off the drug after two months, Kapp would later struggle with the symptoms of the disorder.[2]

Unlike Weitz, Kapp believed that her mental illness was real. Nevertheless, she joined the mental-health liberation movement because of her opposition to forced treatment. She founded a patient-led support group in New Mexico. After attending several conferences, Kapp met and married a fellow activist and moved to California, where she became more political. She saw her fight against forced treatment as an extension of the right to choose recognized in *Roe*. In her view, both abortion and mental-health treatment involved the power for every patient to decide what to "do with [her] life and . . . body."[3]

Activists like Kapp and Weitz brought the right to privacy into a larger debate about mental illness. Some referred to *Roe* by name, while others invoked terms that had become associated with the decision, including a right to choose. The availability of claims related to the decision did not dictate the course of struggles over the treatment of the mentally ill. Instead, activists' use of *Roe* offers a valuable lens through which to view changing ideas about privacy in the context of mental health.

Why did activists make *Roe* a part of their argumentative agenda? Expatients demanded a right to make choices about treatment options, and the *Roe* Court dealt with medical decision making. Activists also hoped to show that notwithstanding stereotypes about their dependence, some mental patients had the competence to make decisions, just as the *Roe* Court had recognized that women, another underestimated group, were capable of exercising control over their reproductive lives. Pointing to a right to privacy

linked to *Roe,* former patients offered new ideas about who could effectively exercise a right to choose, even in the face of mental illness.

These ideas about the right to choose took hold because fights about the treatment of the mentally ill had reached a boiling point. By the early 1960s, nearly 1 million Americans lived in public or private institutions for the mentally ill or mentally handicapped. Psychiatrists and sociologists began questioning the status quo, and by the 1970s a reform movement was under way. Having long taken an interest in the rights of the mentally ill, some established organizations, like the American Civil Liberties Union (ACLU), stepped up efforts to represent disenfranchised patients. New groups, like the Mental Health Law Project (MHLP), formed specifically to transform the nature of institutionalization.[4]

In many ways, those campaigning for deinstitutionalization got exactly what they were asking for. Over the course of the 1970s, the nation's in-patient population shrank dramatically. In 1975, in *Donaldson v. O'Connor,* the Supreme Court held that no one could be institutionalized against her will unless a court adjudicated her to be a danger to herself or others.[5]

In the aftermath of *Donaldson*, psychiatrists, lawyers, and patients debated what the future of psychiatry ought to be. At first, members of groups like MHLP did not compare their cause to the fight for a right to choose abortion; instead they made a right to treatment their priority.

But in the mid-1970s, focus on the right to treatment alienated recently organized ex-patients. Quickly expanding the support groups formed at the start of the decade, these activists identified as radicals and saw direct-action protest as the fastest path to change. Over time, leaders of groups such as the Mental Patients Liberation Front (MPLF) and the Alliance for the Liberation of Mental Patients (ALMP) grew frustrated with the influence medical professionals. To identify an alternative source of expertise, grassroots activists enlisted the help of the mental-health bar, proposing a constitutional right to refuse treatment.[6]

Although *Roe* did not cause the movement to make different arguments, the Court's decision and related ideas about a right to choose became an important part of the rhetorical arsenal of those remaking mental health care. Those referring to *Roe* moved far beyond what the Court had said. Movement lawyers believed that they could use *Roe* to argue that the Constitution recognized a right to think that could be compromised by forced

drugging. *Roe* also seemed to protect autonomy in making certain major life decisions, even if an individual was particularly vulnerable. If pregnant women had a right to contribute to decisions about their medical care, why were those diagnosed with mental illness shut out?[7]

Even when they worked outside the courts, ex-patients sometimes turned to popular reinterpretations of *Roe*. Although the Supreme Court did not define a right to choose or to control one's body, feminists and other supporters of abortion rights equated *Roe* with these liberties. Ex-patients used these understandings of *Roe*'s right to privacy for their own purposes. They insisted that the treatment of mental illness, like the treatment of abortion, was far more than a medical matter. Ex-patients also contended that those who were denied control over mental-health treatment, like women who were denied access to abortion, would always find themselves at the bottom of the ladder. Moreover, activists invoked the right to choose in advocating for a different idea about who had the capacity to make important decisions. These activists claimed that in the abortion context the courts had recognized the autonomy of pregnant women—people, like children, the poor, and the mentally ill, often viewed as too weak and compromised to pick the right path.

These activists strayed far from conventional concepts of the right to privacy. Grassroots activists first questioned who had the competence to contribute to key decisions, calling for respect for those who were reliant on others for support. Some questioned the legitimacy of traditional authority figures, while others insisted that children, mentally ill persons, and welfare recipients could make a valuable contribution to decisions about their own lives. In this way, lay advocates used the right to choose to question hierarchies within the family and the medical profession.[8]

Often without the support of the mental-health bar, ex-patients also disputed the separation between a right to choose and assistance from the state. Organizers focused on the government's refusal to fund a patient-run alternative or to ensure that Americans had work, housing, and the means to live. They claimed that if the government did not guarantee everyone the ability to live independently or receive adequate care, the right to choose or refuse treatment was hollow.[9]

These ideas made a mark in the state and federal courts, where some judges recognized a right to refuse treatment. Politically, advocates hoped

that choice arguments would solidify partnerships between patient groups and activists in movements focused on the rights of women or the poor. In some states and cities, these coalitions successfully pushed for limits on certain psychiatric procedures, including some forms of psychosurgery, the use of seclusion and physical restraints, and electroconvulsive therapy (ECT).[10]

However, the obstacles facing the movement became evident in 1979 when the Supreme Court issued a decision in *Parham v. J.R.* There, the Court considered the constitutionality of a Georgia law permitting the institutionalization of minors when a parent and psychiatrist consented. Antipsychiatry activists and their allies argued that *Roe* recognized a broad right to choose or refuse treatment, even for children and those in psychologically fragile positions. By contrast, the American Psychiatric Association claimed that *Roe* recognized the rights of medical experts and family members to act in the best interest of certain patients.[11]

When *Parham* rejected the constitutional challenge to the Georgia law, the decision foreshadowed a much deeper defeat for liberationists. Concluding that the state had provided adequate procedural protections, the Court's opinion relied on the idea that parents and psychiatrists reliably acted in patients' best interests. *Parham* focused on the costs of expanding autonomy for patients, framing patient care as a consumer good that could skyrocket in cost.[12]

The Court's decision suggested that, after a decade of activism, the mental-health system was just as entrenched as ever before. As support for deinstitutionalization flagged, politicians and courts articulated a vision of choice centered on the rights of paying customers. The National Alliance for the Mentally Ill (NAMI, later the National Alliance on Mental Illness) advocated for family members forced to care for their loved ones. But members of the group did not invest in the idea that patients themselves had rights to choose the course of care. Instead of expanding the definition of who was competent to make a choice, groups like NAMI fought to strengthen the power of family members.[13]

By the early 1980s, reformers also confronted a challenging economic climate and the rise of grassroots conservatism. Desperate to preserve what little federal financial support remained, MHLP attorneys took positions designed to highlight the organization's prestige. Staying away from calls for expanded patient autonomy seemed strategically necessary when MHLP

lawyers could guarantee their clients very little. Patient radicals found themselves in disarray. After a decade of struggle, movement leaders recognized that public faith in psychiatry had only grown stronger.[14]

Movement members had identified sound reasons for incorporating arguments about the right to privacy into their demands for change. Sympathetic lawyers had viewed *Roe* as one of the most natural precedents to use in expanding protections. Lay activists also had seen potential in a right to choose tied to the abortion context. Psychiatrists often gained the upper hand by focusing on the science of mental health. By enlisting the support of lawyers, patient organizers had hoped for a fairer fight. Activists also had tried to bolster coalition-building by connecting their cause to the right to choose. A focus on the right to privacy reminded voters, politicians, and potential allies about what they had in common with those diagnosed with mental illness.

Patient activists and mental-health attorneys had viewed choice arguments as a vehicle for radically new ideas about who had the competence and authority to contribute to major decisions. But by the mid-1980s, movement leaders wondered if they had at most established the political and constitutional importance of mental-health decisions. Choice arguments had not spelled out why or how the mentally ill, or any other dependent group, had the capacity to look out for themselves. To the extent that the mentally ill had won a right to choose, lawmakers still often concluded that this right had to be exercised by someone else.

Early Advocacy for the Mentally Ill

Modern dissatisfaction with the treatment of the mentally ill began well before the 1970s. During the Second World War, because of concern about psychological problems stemming from battle, military medical staff began offering therapeutic sessions to soldiers before rotating them back into combat. The efficacy of this approach convinced psychiatrists such as William Menninger, the founder of the Group for the Advancement of Psychiatry, that more patients could flourish if they received service on an out-patient basis. Mary Jane Ward's *The Snake Pit* (1946) and Albert Deutsch's *The Shame of the States* (1948) painted a sinister picture of in-patient care. In 1946, Congress responded by launching the National Institute of Mental Health (NIMH),

passing the National Mental Health Act, and increasing funding for state mental health programs. As interest in reform peaked, more social workers and vocational counselors joined the mental-health field, and clinical psychologists increasingly joined their experimental colleagues in the American Psychological Association.[15]

By 1960, scholars began to question whether the reforms of previous decades went nearly far enough. Psychologist Thomas Szasz's *The Myth of Mental Illness: Foundations of a Theory of Personal Conduct* (1960) and sociologist Erving Goffman's *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (1961) built on concerns raised about the treatment of the mentally ill in the Soviet Union. As the *New York Times* reported, Westerners often criticized the Soviet Union for defining "schizophrenia so broadly that it covered most political dissidents."[16]

Those influenced by Szasz and Goffman believed that psychiatry in the United States was just as bad. Szasz suggested that many of those diagnosed with mental illness faced punishment for their political views or lifestyle choices, and Goffman maintained that institutions caused many of the ailments afflicting the mentally ill. In 1962, with the publication of Ken Kesey's *One Flew over the Cuckoo's Nest*, these ideas gained a mainstream audience.[17]

The following year, President John F. Kennedy called for a "bold, new approach" to the treatment of the mentally ill. While increasing funding for mental-health research, Kennedy announced plans to shift patients' treatment away from state institutions. By 1963, Congress advanced this agenda by passing the Community Mental Health Act.[18]

The introduction of Medicaid and Medicare created powerful financial incentives for moving patients out of institutions. Medicaid covered the costs of patients moved from mental institutions to general hospitals or nursing homes. Instead of bearing the full cost of treating a patient in an institution, states could shift up to three-quarters of the burden to the federal government. As more patients were deinstitutionalized in the 1970s, many received care from the kind of community health center Kennedy had envisioned. Not only would states benefit from Medicaid and Medicare reimbursement; states could eliminate significant expenses by closing some expensive in-patient facilities altogether.[19]

Cost alone did not explain the appeal of deinstitutionalization. The risk of moving the mentally ill out of institutions seemed low at a time when psy-

chologists and psychiatrists identified an ever-growing number of people as sick. Borrowing from Freudian theory, therapists concluded that many Americans were maladapted. In the 1960s, the *New York Times* reported on the results of a study finding that at least 25 percent of the American population suffered from mental illness. As columnist Ellen Willis explained in 1973: "The criteria for diagnosing psychopathology are so vague and ambiguous that mental illness is whatever a psychiatrist and in some states a physician say it is."[20]

With so many Americans diagnosed with mental illness, it was easy to believe that mental illness was a political invention rather than a medical classification. As categories of mental illness shifted and grew, even some practitioners questioned their ability to provide meaningful diagnoses.[21]

An emerging mental-health bar used litigation to accelerate the transition away from state-run facilities. These attorneys promoted a right to treatment that entitled inmates to care that would cure or improve their condition. Civil libertarians and reformist mental-health professionals hoped that this tactic would finally put an end to the warehousing and neglect that many patients had experienced.

The Right to Treatment

While the ACLU had formed a committee to deal with mental-health issues in the 1940s, in the 1960s, anger about the treatment of the mentally ill provoked new interest. In 1960, Dr. Morton Birnbaum, a physician and lawyer, wrote an article in the *American Bar Association Journal* asserting that the courts should recognize a right to treatment. In Birnbaum's view, the Constitution gave even a severely ill patient the right to demand his release if an institution did not offer him "a realistic opportunity to be cured or improve his mental condition."[22]

Birnbaum's strategy soon gained support. In 1966, without formally reaching a decision on the issue, the DC Circuit Court of Appeals suggested that the Constitution protected a constitutional right to treatment. The first case to deal directly with the right to treatment began when the state of Alabama cut its tobacco tax. Facing a budget shortfall, the Alabama Mental Health Board terminated ninety-nine employees at the state's Bryce Hospital. As part of a suit for wrongful termination, the employees added a patient to

the plaintiff class, and the right to treatment became a key issue. In *Wyatt v. Stickney*, the plaintiffs' attorney, George Dean, worked with Morton Birnbaum and Bruce Ennis, the leading champion of mental-health reform at the ACLU, to co-author an amicus curiae brief.[23]

In 1972, the district court agreed that there was a constitutional right to treatment that the hospital had unquestionably violated. Although the litigation in *Wyatt* would continue, in the short term, reformers' success inspired a more sustained campaign. A year after the court issued *Wyatt,* Ennis and his co-authors on the brief, Charles Halpern, a leader of the National Center for Law and Social Policy, and Paul Friedman, an attorney who had experience working in a mental health center, founded the Mental Health Law Project (MHLP). As the group explained: "The Mental Health Law Project is a sustained, system-changing constitutional attack on the root causes of oppression . . . in the mental health system."[24]

Norman Rosenberg, a lawyer who went on to become the leader of MHLP, found his way to mental-health litigation during the Vietnam War. Instead of entering the draft, Rosenberg pursued a certificate in education and later taught a class of mentally handicapped students. After the end of his year in the classroom, Rosenberg concluded that the mentally handicapped and the mentally ill "needed more protection to get the rights [to which] they were entitled." He went on to law school, where he became involved in a clinical program advocating for children's rights. In 1977, Rosenberg took over MHLP's children's-rights portfolio. In his view, MHLP was the logical choice for a lawyer committed to the rights of the nation's most vulnerable population.[25]

MHLP agreed to represent Kenneth Donaldson, a man recently released from an institution after a fifteen-year commitment. When Donaldson was a young man, his father had him involuntarily committed. Although his father believed that his son suffered from paranoid schizophrenia, Donaldson received no treatment during his stay and gave staff no reason for thinking he was a danger to anyone. Following Donaldson's release, MHLP lawyers sued for damages.[26]

At first, the lawyers running the project did not make much use of *Roe*. Those within MHLP believed that *Donaldson* represented attorneys' best hope for the recognition of a right to treatment. After the Supreme Court agreed to hear the case, movement lawyers debated how MHLP and its al-

lies could capitalize on a possible victory. The meeting turned to a discussion of how much the group should emphasize the right to treatment. MHLP members questioned whether the organization had ignored the demands of former patients. Aryeh Neier, an ACLU leader, warned that "ex-patients [were] facing a backlash." He suggested that lawyers might consult more with people after they left institutions, particularly people denied control over the care they received. Guaranteeing access to some treatment stopped short of the kind of autonomy that some ex-patients had begun to demand. Psychiatrist James Clements agreed that enlisting former patients might advance the cause of reform. As Clements put it, "the most helpful people in these cases [were] often the patients themselves."[27]

Others forcefully rejected the idea of changing course. David Rothman, a historian of mental-health institutions, underlined that MHLP had earned respect by representing those who could not help themselves. The organization risked too much by letting ex-patients drive the agenda. Charles Halpern, one of the project founders, proposed that MHLP narrow its focus by specializing in litigation and also turning away more potential clients. The meeting failed to resolve the issue of whether—and how—the mental-health bar could learn from former patients.[28]

In June 1975, the Supreme Court ruled on *Donaldson* in a single, unanimous opinion. "Assuming that the term can be given reasonably precise content and that the 'mentally ill' can be identified with reasonable accuracy," the *Donaldson* Court stated, "there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom."[29]

At first, MHLP attorneys viewed *Donaldson* as a vindication of everything that project attorneys had worked for. Behind the scenes, however, the Court's decision prompted hard questions about how the movement should proceed. *Donaldson* seemed to recognize a right to liberty as much as a right to treatment. Some in the professional groups MHLP often represented criticized the Court on this basis. Judd Marmor, the new leader of the American Psychiatric Association, complained that *Donaldson* was "a decision on freedom, not the right to treatment." Hoping to benefit from a victory in *Donaldson*, MHLP leaders denied Marmor's accusations. However, the decision prompted sympathetic attorneys to consider what it would mean if Marmor was right. Was it worth making the right to treatment the primary

focus of movement attorneys, or should ex-patients have more say in shaping the agenda?[30]

For ex-patients, the message sent by *Donaldson* was more alarming. As they formed a grassroots movement of their own, these activists saw the right to treatment as a convenient excuse for the abuse of the mentally ill. Rather than swearing off constitutional arguments, activists soon proposed a right tied closely to the *Roe* decision.

Notwithstanding the controversy already surrounding abortion, ex-patients identified several reasons for making the right to choose part of a larger argumentative arsenal. *Roe* brought constitutional law into an area of medical practice. These activists believed that the treatment of the mentally ill similarly crossed the line between medicine and politics.

Ex-patients also drew on the connection between privacy and choice some saw in the 1973 decision. As activists saw it, the Court had protected the autonomy of pregnant women even though society had long assumed that they depended on others for support. Ex-patients pursued an expansion of this principle. Grassroots activists only sometimes mentioned the Supreme Court's decision directly. More often, ex-patients drew on popular reinterpretations of *Roe* centered on a right to choose.

Patients used this right in radical ways. These activists wove together ideas about privacy, choice, and control to defend the competence and dignity of new groups. In court, patients and their attorneys pointed to *Roe* in explaining an evolving constitutional right to privacy that left too many Americans out, including minors, social dissenters, mentally ill persons, and the poor. Outside of court, patients used privacy and choice to contest who had power in medicine and politics.

Patient activists also questioned the distinction between freedom from state interference and demands for government assistance that some made central to the idea of choice. First, patients argued that those diagnosed with mental illness lacked a right to choose not only because there was systemic bias against the mentally ill but also because poverty and unemployment limited their autonomy. Second, in demanding a right to refuse treatment, activists requested resources for ex-patients, including funding for patient-run alternatives. As some ex-patients understood it, the right to autonomy and the right to government aid were both compatible and constitutionally necessary.

A Right to Choose or Refuse Treatment

At first, former patients sought one another out primarily for support. In 1970, in Portland, Oregon, the Insane Liberation Front (ILF) formed a group open only to those who had been institutionalized or diagnosed as mentally ill. The ILF disbanded by 1971, but some of its original members went on to found groups in New York and Boston only a year later. The Boston-based organization, the Mental Patients Liberation Front (MPLF), soon gained attention for organizing within institutions, mobilizing current as well as former patients.[31]

On the West Coast, organizing began in the Bay Area when patients Tullia Tesauro and Jennifer Gleissner met during their stay at Agnews State Hospital. After their release, Tesauro and Gleissner identified an unmet need for patient-led activism. Working with local colleagues, the two helped to launch *Madness Network News*, a newsletter that would later serve as an information clearinghouse for the national movement. By 1973, ex-patients in California had launched the Network Against Psychiatric Assault (NAPA) to attack "the power to impose involuntary 'treatment.'"[32]

NAPA and MPLF patterned themselves on New Left groups, including the antiwar movement. For this reason, leaders of the group often held up grassroots protest as a necessary step in changing society. "People who have an interest in maintaining the status quo are the ones who write the laws and interpret them in the courtrooms," MPLF asserted in the mid-1970s. "Such people will not respond to individual claims about legal rights; they will respond to patients' demands if the collective strength of patients threatens them."[33]

The movement joined by MPLF and NAPA spread and gained influence in the mid-1970s. Organizations formed in states from Hawaii to Missouri to Mississippi. Some mental-health professionals voiced their support for a right to choose or refuse treatment. Congress also seemed interested in hearing from ex-patients. In 1974, a congressional committee charged with studying behavior modification invited activists to share their views on the forced drugging and institutionalization of minors.[34]

With the movement's popularity reaching new heights, radical groups gathered in 1975 for the annual Conference on Human Rights and Psychiatric Oppression. One attendee described the new "diverse and explosive mixture"

of activists present at the meeting. Former patients, New Left activists attracted to the cause, psychologists, psychiatrists, and those offering alternatives forms of care all took part. To many attendees, the conference exposed cracks in the alliance that the movement had begun to construct. Some worried that mental-health professionals aligned with the movement had once again ignored the competence and contributions of ex-patients. A group of ex-patients held an impromptu meeting to protest. Judi Chamberlin, a prominent member of MPLF, argued that those at the meeting had missed "an opportunity to discuss real alternatives and [challenge] the whole idea of professionalism."[35]

Chamberlin saw an alliance with any mental-health professionals as both dangerous and unnecessary. At age twenty-one, after suffering a miscarriage, Chamberlin checked herself in to a mental hospital. Following several voluntary stays, psychiatrists diagnosed her with schizophrenia and involuntarily committed her. During her five-month confinement, Chamberlin experienced forced drugging and seclusion. Her experience convinced her that the system needed to change.[36]

The conference shook Chamberlin and movement radicals, convincing them to seek out alternative sources of support. Fearing that their cause would be co-opted, MPLF leaders vowed to no longer work with the Massachusetts Association for Mental Health or the Department of Public Health. While distancing themselves from therapists, Chamberlin and her allies increasingly viewed the law as an alternative to medical authority.[37]

Just the same, Chamberlin harbored doubts about the wisdom of litigation. She warned her colleagues: "It is hard to prevent the lawyers, rather than the patients, from becoming spokespeople." Many in the movement, Chamberlin among them, nevertheless viewed reliance on legal experts as the lesser of two evils. Across the country, her colleagues started lobbying for local and state laws challenging the balance of power between patients and professionals. In 1974, invoking the right to privacy, MPLF campaigned for a bill that would allow psychiatric patients to access their records. The same year, NAPA lobbied for a bill banning forced chemotherapy, shock therapy, and psychosurgery. Organizers in other states and cities proposed limits on the use of electroconvulsive therapy and the forced treatment of minors.[38]

In the mid-1970s, when proposing new legislation, patient activists made arguments about the right to choose associated with *Roe* an effective part of

organizing, media, and recruiting strategy. As these advocates presented it, this right allowed patients to avoid compulsory psychiatric care. The analogies that the movement drew between abortion and the refusal of treatment presented privacy in a new light. Ex-patients sought to redefine competence, asserting that those without power in the family or in politics had far more to contribute than many recognized. The movement also used choice arguments to demand help from the state. If patients had a right to refuse treatment, it would mean nothing if the government did not financially support better alternatives.

Constitutional Choice and the Refusal of Treatment

Early in the decade, lawyers working within the ex-patients' movement looked to the right to privacy as an alternative to the right to treatment. Doing so required a reinterpretation of *Roe*. The Court's decision said nothing about a right to choose. Any connection between the right to make abortion decisions and mental health was implicit at best. But movement members still hoped to extend the right recognized in the Court's decision. In 1973, the Center for the Study of Legal Authority and Mental Patient Status (LAMP), a group of lawyers in Berkeley, California, described a plan for establishing a right to refuse treatment. Writing in *Madness Network News,* LAMP lawyers argued that if movement lawyers could rely on a right to choose, they could undercut discrimination against the mentally ill. "[F]or most alleged illnesses, the patient has a right to refuse treatment," the article explained. "Doctors have been saying that this doesn't apply . . . because a 'mental illness' is involved." The article suggested that if patients won a right to refuse treatment, the movement would make real progress in establishing the competence of the mentally ill. Just as the *Roe* Court had recognized the competence of women and their equal ability to make good decisions, creating a right to refuse treatment would require more people to dignify the decision-making capacity of the mentally ill. The article tied the right to refuse treatment to "the right of privacy" mentioned in *Roe*. The authors reminded their colleagues: "there are limits to what a government can do to a person's mind, even in the name of 'treatment.' "[39]

After *Donaldson,* new groups also made related privacy arguments an effective tool in lobbying and street protest. The Alliance for the Liberation of

Mental Patients (ALMP), an organization founded in Philadelphia, used an analogy to reproductive rights to advance its cause. The city had already been a focal point for patient mobilization. Local efforts coalesced around the work of attorney David Ferleger. Ferleger had opened an office inside Pennsylvania's Haverford State Hospital to offer patients legal assistance. Horrified by the way staff sometimes treated patients, he brought a habeas corpus suit on behalf of a woman he believed had been illegally committed. This suit launched a much broader initiative, the Pennsylvania Mental Patients Civil Liberties Project. From the outset, Ferleger tried to give patients more of a say in dictating the course of any litigation. "I wanted to resist putting my interests and values above theirs," he explained.[40]

While Ferleger worked in the courts, Bob Harris, an African American member of the Mental Patients Civil Liberties Project, reached out to Chamberlin for help in founding a grassroots political organization. Like Chamberlin, Harris had experience with the system. His story testifies to the way that age and race sometimes shaped the delivery of mental health care. As a teenager, he went hitchhiking. After finding a ride, he agreed to wait in the car while the driver took care of something. Soon, the police approached the car and informed Harris that the vehicle had been stolen. Harris was arrested and charged, and when he refused to plead guilty, a court sent him to Pennsylvania's Fairview Mental Hospital. Harris deeply resented the way he had been treated at the institution, and after getting out and going to college, he became politically active.[41]

After helping to organize ALMP, Harris and his colleagues, like MPLF leaders, worried that if given too much authority reformist mental-health professionals would deradicalize the patients' liberation movement. Indeed, ALMP lost an influential leader because a perceived conflict of interest arose when the activist began a romantic relationship with a woman working in a mental-health facility.[42]

In the political arena, ALMP members used constitutional arguments to steer discussion away from the expertise of mental-health professionals. To be sure, the organization did not rely primarily on legal discourse. ALMP's street protests often mixed humor with serious political demands. On one occasion, group members dressed up as "Dr. Lobotomy" and menaced the crowd with cow brains and butter knives.[43]

Often, however, grassroots activists uninvolved in litigation framed their cause partly as a vindication of the same right to choose set out in *Roe*. ALMP identified constitutional privacy with radical understandings of control and choice. The organization developed a manual designed to teach patients about the right to control their own minds and bodies. Diane Baran, an ALMP leader, compared her cause to the fight for legal abortion. "As many of you have probably discovered, psychiatry can be one of the tools used to keep us from realizing our own potential," Baran wrote. "Note how even today pro-abortionists are viewed as criminal for demanding the right to determine what happens to their bodies."[44]

ALMP leaders pushed the boundaries of the right to privacy. While Harris worked closely with Ferleger's project, most making these arguments were grassroots activists focused on work outside the courts. ALMP members first described mental illness as an outgrowth of a lack of social, political, and economic choice. Baran argued that denying patients the right to choose exacerbated or even caused mental illness. Much as women denied the right to abortion could not achieve true equality, people denied the ability to make treatment choices for themselves would only see their condition deteriorate. *Madness Network News* put the point bluntly: "Poor and Third World people are not even given a choice of alternatives; their only 'choice' is to conform."[45]

Activists describing a right to choose urged Americans to rethink who had the competence to contribute to decisions about their future. NAPA argued that the right to choose recognized in *Roe* had not yet reached all "[o]ppressed people, . . . whether they are adolescents in unhappy homes, wives dissatisfied with their submissive role, or poor people victimized by a system that cares for the rich." ALMP echoed this logic. Self-determination of the kind recognized in *Roe* would have to respect the dignity of groups traditionally dependent on other authority figures, particularly the poor. "With the economy worsening, unemployment rising, racial polarization increasing locally and nationally, and attacks on women and gays increasing, it is becoming more of a struggle to withstand the daily pressures of survival," ALMP explained in 1978. "Without a doubt, people need help. But what does 'help' consist of for those who are unable or unwilling to make it in a highly competitive, alienated society?"[46]

ALMP leaders invoking a right to choose made demands for government assistance. "Instead of institutionalizing ex-psychiatric patients and others who live on the streets," the group explained, "we believe that they . . . should be provided with housing, food, and money." In addition to advocating for a right to choose any treatment or no treatment at all, *Madness Network News* defended "the right of the poor and needy . . . to basic necessities of life."[47]

In lobbying and outreach, MPLF also tested unusual ideas about the right to privacy. MPLF often invoked a right to choose in defending liberty of thought undermined by forced treatment. At the same time, the group used choice arguments to advance different ideas about who could be trusted to make decisions. In testifying in favor of a Massachusetts bill that would have given mental patients access to their own medical records, representatives asserted that the right to choose meant little when sex, race, and poverty shaped views of individual competence. "We believe that denying patients the right to see their records arises from a belief that [certain] people do not know what is good for them," the group stated. Demanding a right to choose for patients required "an equalization of power between patients and doctors." *Madness Network News* echoed this point, insisting that "even the craziest of the crazies retain . . . a basic [right] to choose which path to take."[48]

MPLF also linked the right to refuse treatment to government aid for ex-patients struggling to support themselves. The organization lobbied for state funding in Massachusetts for drop-in centers and other patient-run resources designed to help with jobs, housing, and welfare. The right to choose (or refuse) treatment meant little to those deprived of autonomy by poverty. "As ex-patients, we are refused jobs, housing, and simple respect and dignity because we are mental patients," the group explained in a mission statement. Activists described government aid that would allow people to take care of themselves as a necessary way "to promote [the] autonomy and independence" recognized by the Constitution.[49]

While testing the meaning of privacy, MPLF also courted the support of other social movements that relied on the rhetoric of choice. Given that women comprised a disproportionate share of the nation's in-patient population, ex-patients saw the women's movement as a logical ally. According to the 1973–1974 National Ambulatory Medical Care Survey, female patients in private psychotherapy outnumbered males by three to two. Women were more often civilly committed than men and kept in institutions for longer periods.[50]

For this reason, the movement's rhetoric of self-determination seemed likely to speak to feminists seeking an alternative to conventional therapy. Leo Rubinstein, a sympathetic psychologist, argued that feminist therapy reflected a belief that "[a]ll choices must be based on freedom, not compulsion to take on a role." Feminist mental health collectives championed self-determination for women, as did prominent authors like Phyllis Chesler. In California, NOW issued a report finding that psychiatry denied a woman choice and autonomy in "the development of an identity of her own." Patient activists hoped to build coalitions with feminists convinced that psychiatry was an issue of autonomy for women. In 1977, Chamberlin joined a coalition of feminists and mental patients' liberation groups lobbying against the creation of a state unit for emotionally disturbed women because the new arrangement would deny patients privacy. Activists used choice rhetoric to court other groups, including those belonging to movements for "welfare rights, black cultural identity, daycare, abortion choice, [and] gay and lesbian rights." Coalition-building seemed particularly promising when activists could identify the ways others, including women, "criminals, poor people, [and] children," had lost autonomy.[51]

For several years, privacy arguments functioned mostly as an organizing tool. In the mid-1970s, however, ex-patients signed on to a litigation strategy that tried related arguments before the courts. The shifting agenda of the mental-health bar opened new avenues for ex-patients. Starting in 1974, as Congress took up incidents of psychiatric abuse, MHLP's agenda became more nuanced. Lawyers for the group took on cases involving involuntary treatment. Concerned that litigation could backfire, patient activists still saw value in a partnership with attorneys. Litigation could protect individual patients from abuse, legitimize the movement's cause, and perhaps create a precedent that would fundamentally alter in-patient care.

A Troubled Partnership with the Mental-Health Bar

Starting in the early 1970s, MHLP lawyers had taken on a handful of cases involving forced treatment. In March 1975, the organization participated in litigation involving involuntary sterilization at Partlow School and State Hospital, an Alabama institution for the mentally handicapped. Project attorneys also challenged the use of forced ECT on patients who were involuntarily

committed. While leading right-to-refuse cases, MHLP fielded witnesses to testify before Congress on the use of psychiatric drugs.[52]

Project attorneys used the right to privacy recognized in *Roe* to stake out a moderate position on what the organization called "psychiatric abuse." When Senator Birch Bayh (D-IN) convened a congressional subcommittee to investigate the overuse of drugs in adolescent and adult mental-health facilities, MHLP joined patient activists in offering testimony. The hearings highlighted the horrors experienced by many in institutions. Janet Gotkin, a grassroots activist, testified that she had endured over 100 hours of electroshock and had taken over 1 million milligrams of tranquilizers during her commitment.[53]

Attorneys testifying at Bayh's hearings used the right to privacy to advocate for modest changes to the system. *Roe*'s version of the right to privacy seemed to be a logical tool for those staking out a middle-ground position. *Roe* arguably recognized rights exercised jointly by patients and physicians. For lawyers shying away from radical positions, reform would require the recognition of similar rights, not an overhaul of the entire system of treatment. "The Right to refuse treatment is not only an outgrowth of the doctrine of informed consent; it is also based . . . on the right to privacy," testified James Ellis, a project attorney. "Good medical practice and patient rights are not in conflict in this area."[54]

With the support of mental-health attorneys, patient activists tested the right to refuse treatment in the courts. After launching a lawsuit demanding access to Haverford State Hospital for advocates seeking to organize patients, ALMP developed a legal project of its own. MPLF became involved in litigation after organizing a support group for patients in Boston State Hospital. The conditions at Boston State became a legal issue later, after Richard Cole, a law student, concluded that advocacy for the mentally ill represented one of the few untouched areas of the law in terms of protecting individuals' civil rights. Cole approached the Boston Legal Assistance Project (which later became Greater Boston Legal Services) about the idea of setting up a legal clinic at Boston State. After graduating from law school, he returned to Greater Boston Legal Services and continued his work at the hospital.[55]

After Cole established relationships with patients and staff, some employees confided in him that certain psychiatrists used seclusion and drugs to punish patients or make them easier to handle. With co-counsel, Cole

decided in 1975 to sue the leaders of several units of the hospital to put an end to these practices. The suit, then called *Rogers v. Macht,* relied primarily on the idea of a right to refuse treatment.[56]

Although there was no formal coordination with Cole or any of the attorneys in *Rogers,* MPLF members saw the case as a promising test of the value of litigation. One of the plaintiffs, Ruby Rogers, told a particularly harrowing story. A nursing assistant, Rogers was raising three children in the greater Boston area when she started hearing voices. She confided her experiences to her neighbor, a social worker, who advised Rogers to seek help at a walk-in clinic. Rogers took this advice and eventually agreed to be committed. Because of her medical background, Rogers was open to the idea of drugs but experienced some of them as a form of torture. At one point, she set her hair on fire so she could leave Boston State, go to a different hospital, and avoid the drugs she abhorred. Donna Hunt, another plaintiff, was a minor on an adult ward. She was routinely forced into seclusion treatment when she cut herself or swallowed the pop tops of soda cans.[57]

To be sure, *Rogers* and other refusal-of-treatment cases involved more than privacy arguments. As MHLP had emphasized before Congress, mental-health litigators often invoked freedom of expression, arguing that any right to make decisions meant nothing if citizens had no liberty to form or express thoughts. Other litigators focused on procedural due process, highlighting how few formal processes were in place before patients were committed or forcibly treated. While privacy rights formed part of a much larger strategy, *Roe* nevertheless played a central part in the idea of autonomy advanced by grassroots activists and the lawyers defending them.[58]

The *Rogers* litigation provides a striking example of the importance of choice arguments to the cause. MPLF closely followed early litigation in the case. In 1975, Judge Joseph Tauro issued a temporary restraining order forbidding the hospital defendants from continuing to forcibly drug patients or place them in seclusion absent an emergency. Notwithstanding her suspicion of lawyers, Judi Chamberlin described the *Rogers* litigation as a necessary step in patients' fight for a right to choose their own care as broad as the one recognized for women terminating their pregnancies. "The importance of the injunction," Chamberlin explained, "is that it gives mental patients the right to refuse medication—a key issue in the struggle of mental patients to regain control of their lives."[59]

After becoming involved in *Rogers*, MHLP also relied partly on *Roe* and the right to privacy. MHLP staff attorney Robert Plotkin shaped the group's brief. Plotkin had written at length about how the privacy recognized in cases like *Roe* gave mental patients the right to turn down treatment. He argued that the liberty protected by *Roe* "includes the freedom to decide about one's own health."[60]

Roe also figured centrally in Cole's approach in *Rogers*. Approving of Cole's argument, the district court stressed that "the right to produce a thought or refuse to do so is as important as the right protected in *Roe v. Wade* to give birth or abort." The court reasoned that *Roe* suggested that the Constitution protected against thought control. "Implicit in an individual's right to choose either abortion or birth," the court wrote, "is an underlying right to think and decide."[61]

As the *Rogers* litigation suggests, arguments about *Roe* and the right to privacy united attorneys and patients with very different visions of reform. Activists like Chamberlin used the right to privacy as an entry point into larger conversations about who deserved respect. Defending autonomy in principle meant asking Americans to stop discounting the views of children, the disabled, and the poor. Some attorneys shared Chamberlin's idea about the role of privacy reasoning, arguing that forcibly drugging patients deprived them of the right to control their own minds and bodies, in the process, undermining good medical practice and worsening patients' mental states.

Nonetheless, there were clear differences between the ideas of privacy set out by patients and lawyers. Some attorneys working with MHLP did not emphasize or even discuss the competence of patients. Even sympathetic attorneys often assumed that some psychiatric care could be valuable for patients and that some mental illnesses were real, a premise rejected by many activists like Chamberlin. Moreover, attorneys acknowledged that *Roe* could be interpreted as recognizing rights for psychiatrists as well as patients.[62]

By 1977, when President Jimmy Carter chartered a presidential commission to study the treatment of mental illness, the differences between movement radicals and moderates threatened to derail the reform effort. Promising to make available new sources of political support and money, the presidential commission raised the stakes of debate about mental illness.

Because both movement attorneys and radicals saw the rights of teenagers as a core concern, the Supreme Court's decision to hear a case on juve-

nile civil commitment attracted considerable attention. However, in *Parham v. J.R.*, the justices seemed to share a renewed public faith in parental authority and psychiatric expertise. Citing a high rate of juvenile crime, some politicians argued that awarding minors any new rights would further erode parental authority. The community health centers that replaced state institutions sometimes failed to meet patients' needs, and commentators expressed concern that many of those who had left mental institutions faced homelessness or incarceration. In this new environment, demands for patient autonomy often fell on deaf ears.

The Struggle for Juveniles' Rights

Psychiatrists at Woodlawn Hospital concluded that sixteen-year old Debbie Spray had an "emotionally unstable personality." Spray came to the facility after administrators expelled her from school for truancy. Her mother complained that Debbie had run away several times and occasionally stayed out all night. Once, after coming home, she reported that she had been raped, but no one believed her. Later, the man she accused was convicted of sexually assaulting several minor girls. Her commitment and sexual assault stayed with Spray years long after the fact. Nine years after her release from Woodlawn, Spray worried that her medical records would impact her ability to get a job. Worse, she believed that her hospitalization represented nothing more than punishment for her "attempt . . . at self-determination."[63]

Stories like Debbie Spray's sparked an effort to create protections against involuntary commitment and treatment for juveniles. To be sure, groups like MHLP and MPLF gravitated to juvenile cases because they raised issues central to the entire reform effort: the competence of vulnerable groups, the importance of universal self-determination, and the necessity of government intervention to help those exercising a right to choose. However, cases involving adolescents benefited from support for a broader children's rights movement formed in the 1970s. In books like Richard Evans Farson's *Birthrights* (1974), John Holt's *Escape from Childhood: The Needs and Rights of Children* (1974), and Shulamith Firestone's *The Dialectic of Sex* (1970), commentators called for a variety of new rights for children.[64]

In the 1960s and 1970s, the time seemed ripe for such a movement. First, commentary about a "generation gap" between adolescents and their parents

was hard to miss. The term "teenager" emerged after 1945 when marketers targeted members of the baby-boom generation. By the end of the 1960s, in the face of mass protests, a declining economy, and a lack of progress in Vietnam, radicals in the antiwar movement and the New Left made a generational divide seem undeniable. The generation gap called into question deep-rooted beliefs about the ability of authority figures, including parents, to effectively protect children's rights.[65]

Public preoccupation with the generation gap inspired the formation of a movement for children's rights. In 1973, Marian Wright Edelman founded the Children's Defense Fund, a group lobbying for children's rights, and a year later, Congress passed the Child Abuse Prevention and Treatment Act, landmark legislation designed to prevent neglect as well as abuse.[66]

Throughout the 1970s, ex-patients saw minors as particularly vulnerable to abuse. In 1975, NAPA members protested amendments to the federal Social Security Act requiring early screening for mental illness. As the *Madness Network News* explained that June: "Very often parents sign their child into mental institutions as punishment for disobeying parental orders, or because they disapprove of their children's lifestyles." When Congress debated the root causes of juvenile delinquency, NAPA leader Wade Hudson spoke out against any involuntary drugging of juveniles.[67]

Litigation on behalf of juveniles took off in the mid-1970s. The Mental Patients Civil Liberties Project challenged the constitutionality of a Pennsylvania statute allowing for "voluntary" commitment of juveniles when a parent or guardian requested it and the director of an institution agreed. After a three-day hearing in 1974, the district court in *Bartley v. Kremens* struck down several provisions of a modified version of the statute. Acting with the assistance of the Southern Poverty Law Center, two minors challenged a similar Georgia law. *Bartley* became moot when the Pennsylvania legislature amended the state statute, putting in place the protections that the plaintiff class had demanded. However, the Georgia case, *Parham v. J.R.,* would eventually reach the Supreme Court.[68]

Parham ultimately revealed new stumbling blocks for reform. Because of the inadequacy of community health centers, lawyers, therapists, and parents argued that deinstitutionalization had gone too far. Instead of repudiating the idea of a right to choose for patients, psychiatrists and family members redefined it. Patient organizers described a right to privacy that would re-

quire the government to tame capitalism and aid the poor. By contrast, family organizations and therapists redefined patients' rights in terms of consumerism: patients' families deserved quality services in return for their money. Moreover, in invoking choice, family organizations fell back on conventional arguments about authority. These groups suggested that loved ones, not patients, were not only the ones paying the bill for mental health care but also the ones best qualified to decide what patients required.

These ideas of patient choice surfaced in 1977 when First Lady Rosalynn Carter set out on a nationwide tour designed to diagnose the state of the nation's mental health care. That February, President Carter chartered a commission to study potential reforms and named his wife as its honorary chairwoman. In May, witnesses began airing their complaints. Many highlighted dramatic shortfalls in the number of psychiatrists, as well as a lack of adequate funding for community mental-health centers.[69]

Members of the patients' movement welcomed the hearings. Bob Harris of ALMP told Congress that the mental-health system facilitated the oppression of women, racial minorities, and the poor. Notwithstanding the limits of privacy arguments, Harris still emphasized them. He mentioned *Roe* as a source of "the absolute right to be free of any procedure to alter one's mind or behavior." Activists allied with Harris restated this argument. "As long as we do not destroy the bodies and property of others, please let us control our own destinies," one advocate argued in advocating for a constitutional right to choose.[70]

The commission generated a final report that included over 100 recommendations, but to the disappointment of members of the antipsychiatry movement, none of them involved a right to refuse treatment. Instead, the report argued that psychiatric care should be better funded and more readily available.[71]

In some ways, patient groups had not expected much from the commission. "Judging by the past performance of similar commissions," *Madness Network News* predicted that "the commission will probably take testimony from a few 'experts,' then write a report calling for billions more to be spent on psychiatry." Nevertheless, the commission's work deepened a rift between movement attorneys and activists. MHLP had worked closely with the commission and done nothing to advance ex-patients' agenda. Chamberlin and other members of MPLF concluded that even sympathetic lawyers still did

not believe that the mentally ill could contribute to decisions about their own lives. "The Mental Health Law Project has often been suspected of holding a low opinion of the very people it ostensibly exists to 'help,'" Chamberlin complained to her colleagues.[72]

While tensions between patients and lawyers continued to simmer, both factions worked to expand rights for juvenile patients. The issue attracted attention because of a larger struggle over parental rights unfolding in the late 1970s. Starting earlier in the decade, conservative Christians unhappy about public-school curricula battled for the recognition of broad parental rights. These activists took issue with instruction on everything from evolution to sex education. In the same period, in both criminal and abortion cases, civil libertarians argued that those charged with protecting minors often let them down. *Parham* pitted these visions against each other.[73]

Parham also invited activists to weigh in on an analogy between minors' right to make decisions about abortion and mental-health treatment. The Court had addressed minors' abortion rights in a pair of 1976 cases that made the outcome of *Parham* hard to predict. In *Planned Parenthood of Central Missouri v. Danforth* and *Bellotti v. Baird I*, the Court emphasized that minors did not have abortion rights identical to those of adult women. As the *Danforth* Court explained: the "State has somewhat broader authority to regulate the activities of children than of adults." But *Danforth* struck down a law requiring parental consent for abortion, stressing that "[c]onstitutional rights do not . . . come into being magically only when one attains the state-defined age of majority." *Bellotti I* addressed another parental involvement law, and because the justices could not tell whether disputed Massachusetts law allowed mature minors to get an abortion without parental consent, the Court sent the case to the Massachusetts Supreme Judicial Court for clarification. Although the impact of the Court's abortion jurisprudence was unpredictable, ex-patients and their allies claimed that minors' rights to control their own psychiatric care had to be at least as broad as their power to make decisions about pregnancy.[74]

In May 1977, the Supreme Court noted probable jurisdiction in *Parham*. Whether *Roe* controlled the case proved to be a central issue. The attorneys challenging the law framed "the unreliability of psychiatric diagnosis" as a reason for deferring less to psychiatrists or psychologists than to abortion providers. "It is this difference [in reliability]," they argued, "which has caused

the court to accord greater weight to a physician's recommendation of abortion than to a decision to institutionalize."[75]

Indeed, appellees and sympathetic amici argued that *Roe* and its progeny recognized a privacy right that allowed minors to have a say in their own treatment. The Child Welfare League of America stressed that "commitment to a mental institution also substantially affects the 'right to privacy' of children." The League insisted that minors demanding protection against arbitrary commitment could invoke the same right that prevented "absolute or arbitrary prohibitions upon their decisions to prevent or terminate pregnancies." Working with the Children's Defense Fund, the Mental Health Law Project submitted a similar brief on behalf of the American Orthopsychiatric Association. So did the American Bar Association, which focused on the probability of involuntary medication for any juvenile in an institution. The ABA argued that commitment would lead to the kind of privacy violation that the *Roe* Court had condemned.[76]

The briefs submitted by the State of Georgia and the American Psychiatric Association described *Roe* in quite different terms. The state's brief insisted that *Roe* required "deference to the medical opinions of physicians," including psychiatrists. As the brief reasoned: "This Court's decision in *Doe v. Bolton*, [*Roe*'s companion case,] . . . recognizes the existence of a presumption that physicians are competent to make the medical decisions required of them." Joined by other mental-health organizations, the American Psychiatric Association suggested that, far from empowering vulnerable patients, *Roe* awarded rights to doctors because of their expertise. Joel I. Klein, a prominent member of MHLP, authored the group's argument. Klein also suggested that, under *Roe* and *Danforth*, parents had sweeping discretion unless "a child [was] in danger of suffering grievous harm." The Court's decision was far from a call for patient autonomy. *Roe* required deference to family and experts.[77]

When the Court handed down its ruling in *Parham*, the decision's reasoning reflected a broader shift in attitudes about the treatment of the mentally ill. After the case was reargued in October 1978, the justices finally issued an opinion in June of 1979. By a vote of 6-3, the Court upheld the Georgia law. The majority began by addressing whether minors had a liberty interest at stake in commitment cases. Concluding that the statute would pass muster even if minors had such a right, the justices never decided the issue.[78]

The Court next addressed any potential danger in relying on parents to act on their children's behalf. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," the Court reasoned. "More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." The majority admitted that there were limits on parental discretion, but only in cases when there was wrongdoing or the exercise of an "absolute veto" over a child's decision of the kind discussed in abortion jurisprudence. Concluding that neither applied to the case at bar, the majority found deference to parental prerogatives to be appropriate.[79]

Rather than highlighting the problems with forced treatment, the *Parham* majority described procedural protections as an unnecessary financial burden. "Obviously, the cost of these procedures would come from the public moneys the legislature intended for mental health care," the Court explained. Concurring in the judgment, Justice Potter Stewart also highlighted the importance of parental rights, suggesting that *Roe* and its progeny only reinforced parental authority. "Under our law," he reasoned, "parents constantly make decisions for their minor children that deprive the children of liberty, and sometimes even of life itself."[80]

Dissenting in part from the majority opinion, Justice William Brennan echoed the idea of privacy championed by ex-patients and children's rights activists. As Brennan explained: "The right to be free from wrongful incarceration, physical intrusion, and stigmatization has significance for the individual surely as great as the right to an abortion." In Brennan's view, the decision to commit a child, like the choice to have an abortion, hardly represented the kind of run-of-the-mill parenting decision to which courts often deferred. Nonetheless, even Brennan and the justices joining him felt that a full-blown adversary hearing was unnecessary to protect patients' interests.[81]

In some ways, *Parham* would always have been a difficult case, challenging entrenched ideas about both children and the mentally ill. The Court's opinion reflected growing anxiety about the connection between adolescent misbehavior, mental illness, and the erosion of parental authority. In the mid-1970s, the rate of juvenile crime rose to unprecedented levels. At

the state and city level, politicians cracked down on juvenile crime, proposing curfews and longer prison sentences.[82]

Working in groups like the Moral Majority, recently mobilized conservative evangelicals decried what they saw as an attack on parental rights in Supreme Court decisions on everything from birth control to school prayer. "Parents' rights come from God," said Connie Marshner, a conservative activist. "[C]ontinuation of civilized society presupposes the existence of a family unit." Parent advocates took on school boards and created a powerful homeschool movement. Other right-leaning activists fought for parents' rights in the context of abortion, insisting that teenage girls would scar their psyches and ruin their lives if parents did not have a say in whether a pregnancy ended.[83]

MHLP recognized a powerful backlash against the idea of rights for juvenile patients. "Although the child advocacy movement has garnered a lot of attention lately, not all of this publicity has been positive," argued an article in the organization's summer 1978 newsletter. "All too often legal-advocacy efforts on behalf of children are simplistically viewed as destroying family life." *Parham* reflected contemporary anxiety about adolescent misconduct and the erosion of parental authority.[84]

Nevertheless, the Court's decision exposed special obstacles facing those who demanded further liberties for all psychiatric patients. As the *Parham* Court's decision suggested, faith in psychiatry had also grown in proportion to disenchantment with deinstitutionalization. The community-based alternatives imagined by President Kennedy seemed ill-equipped to help the patients who had been released. Some former patients visibly increased the homeless population of major cities. Others found themselves rotating in and out of institutions, being adjudicated a danger to themselves or others when refusing medication, receiving in-patient treatment, recovering, and leaving the facility only to return again. Former patients sleeping in the New York subway came to symbolize the failure of a plan designed to balance patient autonomy and the welfare of the community. As the President's Commission reported: "it is now widely acknowledged that deinstitutionalization has, in fact, aggravated the problems of the chronically mentally disabled."[85]

Widespread criticisms of deinstitutionalization convinced some reformers that patient self-determination had gone too far. As early as 1976,

some members of MHLP argued for more, not less, institutionalization. At a May 1978 meeting, MHLP attorneys also expressed serious reservations about a right-to-refuse treatment strategy.[86]

In addition to reevaluating their priorities, the leaders of MHLP modified their message. Instead of discussing the *Roe* decision or a related right to privacy, the group more often argued that attorneys should safeguard rights that patients could not exercise for themselves. "Because of their disabilities, the mentally handicapped are uniquely dependent on effective advocacy to demand standards for their protection," MHLP explained in a fundraising letter. Attorneys for the group also went out of their way to denounce any perceived radicalism. "While we defend the civil liberties of mentally handicapped people," argued another fundraising letter, "we have to keep in mind an intricate balance of rights—between the individuals and society, between disabled individuals and the professionals responsible for their care."[87]

At the same time, parent-driven organizations formed to advocate for the rights of family members of the mentally ill. In 1979, a variety of family-centered support groups had already met in local communities. A University of Maryland professor studying these organizations held a national gathering to bring families together, and it was an immediate success. Members of fifty-nine support groups founded what was then called the National Alliance for the Mentally Ill, and the organization immediately attracted financial support from both the federal government and the MacArthur Foundation.[88]

Members of NAMI quickly gravitated to biological explanations of mental illness. Because Freudian theory often blamed bad parenting, NAMI members found medical explanations profoundly reassuring. As one member later explained: "We and other families felt guilt and shame until science increased our knowledge of the biological and biochemical causes of mental illness." This idea captivated those charged with the care of family members when community health alternatives proved inadequate. Shirley Starr, a founding member of NAMI, spoke for many when she argued: "Families . . . are not so powerful as to cause mental illness."[89]

NAMI members also questioned the wisdom of deinstitutionalization. As patients moved out of state institutions, families increasingly shouldered the costs of care. Some NAMI members criticized this privatization of welfare. Others brought together concerns about parental and consumer rights, ar-

guing that politicians needed to pay more attention to those who paid for care. Ginny Krumdieck of NAMI explained: "We see deinstitutionalization as a humane premise with some inhumane results."[90]

NAMI quickly expanded and won powerful allies in Congress. Only six years after its founding, the organization had 500 affiliates in different states. NAMI's rise both reinforced and reflected changes in the politics of mental health. The group expressed considerable optimism about the methods used to treat mental illness. Members of NAMI also voiced widespread frustration with the aftermath of deinstitutionalization, particularly the concerns of those who paid for (rather than those who received) mental-health services.

The new political era reflected in *Parham* witnessed a further split between patient groups and the attorneys seeking to represent them. In the later 1970s, the Supreme Court seemed increasingly hostile to the idea of a right to choose one's own mental health care, but the courts were not the only problem. In the late 1970s, Congress created new programs for groups including minors, rape victims, and those with chronic mental illness. Seeking to capitalize on these new funding sources, MHLP drifted further from patient groups. Arguing that concerns about mental illness were often overblown, ex-patients had claimed that many in treatment, including minors and the poor, had the capacity to exercise the right to choose. MHLP lawyers increasingly insisted instead that patients needed more treatment, not more autonomy. At a time when the organization depended on its political influence, MHLP leaders eschewed radical positions that they feared would damage the group's reputation.

After the election of Ronald Reagan, a shrinking budget and a shift toward political conservatism eliminated more of the common ground that ex-patients and attorneys had once shared. The Reagan administration slashed funding for many of the programs that previously provided services to the mentally ill and the disabled. Seeking to preserve some of the few resources still available, MHLP attorneys played up the helplessness of those who were reliant on government aid. It did not make sense to invoke *Roe*'s right to choose in the same way when lawyers often argued that patients could not survive on their own. While patient groups still mentioned a right to choose tied to *Roe,* attorneys emphasized that those with a disease or disorder could not defend their own interests.

Facing a crisis, patient groups like MPLF and ALMP struggled. When some activists formed a consumer-oriented group, Chamberlin and her allies started a competitor to continue the attack on the mental-health field. Ultimately, however, with the public convinced of patients' incompetence, any right to choose would be limited.

Economic Decline and Political Conservatism

In the later 1970s, Congress's interest in mental health meant very different things to MHLP and ex-patient groups. In 1975, Congress passed the Developmentally Disabled Assistance and Bill of Rights Act, requiring each state to have a protection and advocacy program for the disabled in place by 1977. While patient groups worried that Congress's involvement would lead to an expansion of compulsory treatment, MHLP immediately took advantage of new sources of funding. At first, most of MHLP's financial support came from private donors. But as Congress became more involved, MHLP began receiving over 60 percent of its funding from the federal government. As MHLP depended more and more on elected officials, the organization steered away from any radicalism that might undermine its political influence.[91]

Ex-patients first complained about their relationship with MHLP before that organization hosted a goal-setting conference. In a 1977 questionnaire, MPLF described its goal as a right to choose tied to *Roe*—an effort "to gain for all mental patients and former mental patients the right to control our own lives." MPLF complained that movement attorneys had maintained "insufficient contact with [the] organized ex-patient movement" and as a result had prioritized the "kinds of cases to which [ex-patients] would not have given high priority or [thought] would be harmful, specifically the right to treatment cases."[92]

MPLF members worried that the litigation strategy developed by MHLP only replicated the broader problem grassroots activists had set out to solve. Ex-patients had repeatedly urged Americans to rethink the competence of disenfranchised persons, including the mentally ill. These activists wanted lawyers and voters to believe that those in treatment could make valuable contributions to their own health care and to the larger society. MPLF asserted that movement "priorities should be determined by patients and ex-patients." Members of the group worried that attorneys saw themselves as

experts in the legal arena and often attached little value to the opinion of patient organizers.[93]

In the short term, MPLF members took comfort from MHLP's ongoing involvement in right-to-refuse litigation. In the late 1970s and early 1980s, MHLP continued working on *Rogers* and a companion case, *Rennie v. Klein*. In 1978, in *Rennie*, a New Jersey district court recognized a constitutional right to refuse treatment based on constitutional privacy protections. Citing *Roe*, the court explained: "the right of privacy is broad enough to include the right to protect one's mental processes from governmental interference," as well as "[t]he right to control one's own body." The following year, the court issued a ruling clarifying its decision, holding that voluntary patients had an unqualified right to refuse treatment. Furthermore, the court put procedural protections in place before involuntary patients could be forcibly medicated. When *Rennie* and *Rogers* were on appeal, MHLP submitted amicus briefs in both cases, heavily relying on *Roe* and the right to privacy.[94]

By 1981, both the First and Third Circuits had issued decisions. In *Rennie*, the Third Circuit recognized a liberty interest covering the refusal of antipsychotic drugs and held that the state could effectuate its interests only if it used the least intrusive means of doing so. In *Rogers*, the First Circuit recognized a liberty interest rooted in privacy and the Due Process Clause of the Fourteenth Amendment. The court held that absent an emergency a judge had to find a patient incompetent before she could be forcibly medicated.[95]

After the Supreme Court granted certiorari in *Rogers* in April 1981, the issue of a patient's right to refuse took on new significance for MHLP. The group submitted a brief on behalf of the American Psychological Association and several affiliated groups. Citing *Roe*, MHLP argued: "This Court consistently has held that individuals have a constitutionally protected interest in making particularly personal or intimate decisions." The organization insisted that if people had a right to make decisions about abortion, the choice to take a mind-altering drug was just as important and personal. MHLP argued that unless therapists faced an emergency or a patient was no longer competent, the state should respect that liberty interest.[96]

When the Supreme Court decided *Rogers* in 1982, the justices applied a Massachusetts Supreme Judicial Court decision handed down between the First Circuit's opinion and the Supreme Court's grant of certiorari. That

opinion, *Guardianship of Roe*, identified a liberty interest for noninstitutionalized, mentally competent persons to refuse antipsychotic drugs. Concluding that the Massachusetts ruling should influence the disposition of *Rogers*, the Supreme Court remanded to the First Circuit. In 1984, MHLP celebrated a win in that court. Looking both to the Constitution and a recent Massachusetts statute governing the administration of antipsychotic drugs, the First Circuit recognized a liberty interest for patients who refuse treatment. Concluding that the procedures set out in that law adequately protected patients, the court signed off on a new regime governing some forms of involuntary treatment.[97]

Notwithstanding MHLP's involvement in the *Rogers* case, the relationship between the mental-health bar and the antipsychiatry movement deteriorated in the late 1970s and early 1980s. The tension between the two sides seemed undeniable in 1979 when MHLP began working with the Practicing Law Institute (PLI) to host workshops for lawyers on mental-health law. Because the events promised to define the constitutional law of mental health for those unfamiliar with it, the framing of the workshops quickly became political. In a letter to friends and members of the project, Paul Friedman of MHLP explained that attorneys would lead the discussion. Because the sessions would present deinstitutionalization and the right to refuse treatment in a positive light, attorneys who represented institutions or professional organizations complained that the sessions were biased against psychiatry.[98]

Ex-patient groups found the organization of the workshops deeply disturbing. Veteran ex-patient board members of MHLP, including Janet Gotkin, took offense when Friedman left antipsychiatry advocates out of the planning for the event. Friedman argued that the workshop should avoid the topic of patient competence in exercising a constitutional right to choose. "I believe it's important to avoid using these seminars to continue the familiar debate about whether mental illness is a myth and about the related ethical, philosophical, and social policy issues," Friedman wrote to those planning the event. "I fear that if we provide a podium for members of the ex-patients groups we might be obliged do the same for representatives of all developmental disabilities."[99]

MPLF and allied groups reacted with outrage. Gotkin demanded that patients be included in the seminars. She argued that if the movement ef-

fectively demanded a right to choose, attorneys and activists would have to convince the courts and the public that patients could make decisions for themselves. "No one but an ex-inmate could give lawyers an accurate picture of these problems," Gotkin wrote to Friedman. "[N]o lawyer who is not aware of these problems can effectively represent his or her client." MHLP's apparent refusal to do so represented "a perpetuation of stereotypes about mental patients and a step backward in the fight for full equality."[100]

MHLP responded to Gotkin's demands by voting to remove her from the organization's board of trustees. As she recognized, the success of the mental-health bar did not always advance ex-patients' goals. With Ronald Reagan in office and a sympathetic Congress ready to slash government expenses, MHLP refocused on access to services, often employing the consumer rhetoric used by NAMI.[101]

The ex-patient movement struggled to adjust to these developments. Borrowing from the strategy NAMI had crafted, some patient activists created their own consumer organizations. Others, Chamberlin among them, continued pursuing a more radical strategy. The split between the two factions was only the beginning of the movement's problems. Activists had hoped that privacy arguments would help build partnerships with other progressive movements and lead to a win in the courts. But the movement grew increasingly convinced that privacy reasoning did not challenge ideas about the incompetence of the mentally ill directly enough.

A Turn to Consumerism

The early-to-mid-1980s presented stiff challenges to patient activists. After securing a landslide victory in the 1980 election, Ronald Reagan fulfilled his promise to shrink the federal government. Reagan successfully promoted the Omnibus Budget Reconciliation Act of 1981 (OBRA), a budget law that increased defense spending, slashed nonmilitary funding, and substantially lowered taxes. Superseding all earlier legislation on the subject, the law funded mental-health initiatives only through state block grants and cut the latter by 21 percent. Although President Carter had helped push through the Mental Health Systems Act, a statute that authorized new spending and community centers, the Reagan administration never implemented most of the law's provisions.[102]

At the same time, a difficult economy undercut popular support for government programs, including those for the mentally ill and disabled. As Asian economies industrialized and the Vietnam War dragged on, consumers faced a 1973 crisis in oil prices. For the first time since World War II, American workers had to deal with both higher inflation and economic stagnation. Unemployment spiked, particularly in the industrial centers of the Midwest. On the campaign trail, Reagan attributed the nation's economic struggles to the policies of the past several Democratic presidential administrations. As a cure for the nation's economic woes, he prescribed tax cuts and smaller government. Reagan's message made sense to voters and even to leading Democratic politicians, who offered their own suggestions for shrinking the state.[103]

For MHLP, the new political and economic reality ushered in by Reagan's election dictated a more cautious approach. By 1981, the organization received less than 15 percent of its overall funding from the government. MHLP members had long chalked the group's success up to its reputation for moderation, expertise, and efficacy. By 1983, Norman Rosenberg, the organization's leader, believed that MHLP's survival depended more than ever on the respect it commanded from national elites. As he explained: "As a result of sudden shifts in the country's political and economic climate, . . . [the organization's] reputation and enthusiastic small staff were almost the Project's only resources."[104] At a time when calls for choice for mental patients seemed radical, MHLP increasingly channeled resources into the fight for federal dollars for the mentally ill and disabled.

High-profile acts of violence committed by the mentally ill also made MHLP lawyers reluctant to advocate for patients' right to choose. In March 1981, John Hinckley Jr. tried to assassinate President Reagan. Although the attempt failed, Hinckley injured the president, struck several Secret Service agents, and partially paralyzed James Brady, Reagan's press secretary.[105]

Later, reporters revealed that Hinckley suffered from mental illness. He planned the attack to impress the actress Jodie Foster after becoming obsessed with her following a screening of the film *Taxi Driver*. Although Hinckley faced thirteen criminal charges, he was found not guilty by reason of insanity in 1982. Hinckley's attempt intensified public fear of the mentally ill. Following the assassination attempt, the idea of recognizing autonomy for patients seemed dangerous. With more stigma surrounding mental illness,

members of MHLP worried that calling for a right to choose for patients would only make things worse.[106]

Ex-patients viewed these developments with dismay. At a March 1985 meeting, members of different patient groups expressed regret about the movement's reliance on litigation. Sally Zinman, a prominent activist, asserted that MHLP lawyers had "allied with the wrong people," particularly moderate politicians who wanted more treatment for the mentally ill. Judi Chamberlin went a step further, arguing that the leaders of MHLP had "always [been] paternalistic" and "[n]ever took [the] right [to choose or refuse treatment] seriously."[107]

By the fall of 1985, ex-patients debated how to move forward. At a conference on alternatives to conventional treatment centers, a group led by Pennsylvania advocate Joseph Rogers circulated seven position papers outlining the procedures and purposes of a proposed national group. Diagnosed with schizophrenia at age nineteen, Rogers had once despaired of ever finding a job and soon became homeless. He eventually found his way to a New Jersey YMCA and in 1984 began working in outreach for the Mental Health Association of Southeastern Pennsylvania. Rogers soon proved to be extraordinarily ambitious, envisioning a consumer-based and pragmatic patient organization. At the conference, he brought his plan closer to fulfillment, launching the National Mental Health Consumers' Association (NMHCA).[108]

From the beginning, the NMHCA further fractured the ex-patient movement. Those present at the 1985 conference disagreed about whether the organization should take an "antipsychiatry" or "consumer" perspective. A majority present argued against continuing to focus on the refusal of compulsory treatment. Seeking influence at a time when consumerism had gained political influence, NMHCA leaders looked for ways to succeed within the system. Furious about what they considered NMHCA's apologetic stance, Chamberlin and her allies formed a competitor, the National Association of Psychiatric Survivors (NAPS, originally called the National Alliance of Mental Patients).[109]

In 1986, NAPS leaders turned to the right to choose as a tool to bring supporters to their side. Arguments about choice helped Chamberlin and her allies justify the group's existence to those who argued that the movement could not thrive as long as two competing bodies claimed to represent it.

Chamberlin stressed the importance of a right to choose in defending her strategy. "I believe that this is a crucial time for our movement," she stated. "[D]o we want to be ex-mental patients taking a clear stand against forced treatment, or 'mental health consumers' unwilling to alienate the system?"[110]

Chamberlin also emphasized choice arguments in persuading prominent advocates to join her group. In early 1986, Howie the Harp, a leading activist, wrote Chamberlin about the downside of having "two competing National Groups claiming to represent *us*." Chamberlin argued that anyone committed to the idea of patient privacy and the right to choose would have to support her group over the competition. "If people who consider themselves 'mentally ill consumers' want to have an organization to work for 'better treatment' (whatever that may be), don't want to take a stand against forced treatment, . . . that's one thing," Chamberlin wrote. "But why you, as a prominent spokesperson over the years for freedom and self-determination, want to join such an organization . . . is quite another."[111]

Later that spring, Chamberlin's group set out a draft agenda centered on a right to choose related to the one in *Roe*. The group vowed "[t]o promote and ensure the rights of people in and out of psychiatric treatment situations, with special attention to the absolute right to refuse psychiatric treatment, to exercise the right to freedom of choice."[112]

Neither patient group made a lasting mark on the politics of mental health, and by the end of the decade, both were defunct. What is now called the consumer / survivor movement lived on. In the 1980s, there were more than 100 consumer / survivor groups offering support to patients. Partly because of the successes of other consumer movements and the rise of disability-rights activism in the 1990s, more Americans believed that patients could, with proper support, function independently outside of institutions. Consumer / survivor groups later received funding from the state and federal government as well as recognition for peer advocacy and self-help. Because of the movement's influence, patients now sit on state mental-health councils, work for mental-health agencies, and serve on related policy committees. Nevertheless, many of the core demands of the patient movement of the 1970s were never met. Mental illness remains highly stigmatized, and protections against involuntary treatment are incomplete at best. Controversial treatment methods, including seclusion and electroconvulsive therapy, are still broadly legal. Tensions with family-led groups like NAMI continue.

Consumer / survivor groups sometimes won the ability to participate in policy-making, but what the movement got fell far short than what patients had demanded. Internal divisions helped to undermine the momentum of a right to choose or refuse treatment. While some worried that Chamberlin's group was too radical, others refused to join because the organization did not take bold enough positions. Operating in an unfriendly environment, ex-patients seeking rights to self-determination could not agree often enough to make themselves heard.[113]

At the same time, Chamberlin and her allies questioned whether choice rhetoric had betrayed at least some of its promise. Patients hoped that mentioning broad ideas of privacy would allow their movement to reach feminists, children's rights supporters, and welfare-rights advocates concerned about issues of autonomy. Moreover, coalition partners could endorse choice for patients without questioning the legitimacy of psychiatric care. But because these claims did not directly ask anyone to rethink the competence of the mentally ill, ex-patients wondered if the right to refuse treatment was hollow all along.

The Decline of the Right to Refuse Treatment

Roe became a part of a larger dialogue about how America should treat the mentally ill. The lawyers who founded MHLP believed that the Supreme Court would recognize a right to treatment that would liberate many kept in mental institutions against their will. Framing their cause around the right to treatment, attorneys like Norman Rosenberg described lawyers as the protectors of the mentally ill.

As the battle between some psychiatrists and attorneys escalated, patient activists worried that debate about mental-health reform would once again marginalize those with the most at stake. Understanding how these activists and the lawyers who represented them used the *Roe* decision reveals new ways of thinking about the right to privacy. At times, activists mentioned the Court's decision. Often, advocates instead mentioned related ideas about a right to choose. In both cases, movement members sometimes treated privacy and choice as one and the same, hoping to use familiar ideas associated with the former to promote more controversial ideas about who deserved autonomy.

Outside of court, activists invoked privacy in asking Americans to rethink who had the capacity to contribute to important life decisions. Patient activists also described a right to privacy that was entirely compatible with demands for government assistance. Privacy arguments seemed to be a logical weapon for both political and legal reasons. Aware that there was very little precedent on issues of mental health, lawyers viewed *Roe* and its progeny as a natural source of support. Lay activists saw a right to choose related to the decision as a valuable tool in building a partnership with other progressive movements. The movement did not take up privacy arguments because of *Roe*, but the decision (or popular reinterpretations of it) seemed to capture a vision of choice that ex-patients and their advocates could effectively weave into calls for change.

But as the 1970s progressed, it was far from clear that arguments about a right to choose actually changed perceptions of the mentally ill. The litigation of *Parham* revealed how far politics had moved away from support for patient autonomy. *Parham* became part of a new politics focused on the rights of family members and consumers.

By the mid-1980s, ex-patient groups struggled to find a place in the politics of mental illness. The public seemed more convinced than ever of the efficacy of psychiatric treatment, and deeply divided patient groups disbanded not long after forming. While the consumer / survivor movement later became an increasingly visible part of the policy-making process, the goals of the earlier movement, including recognition of a right to choose or refuse treatment, were never fulfilled. In telling his story, Don Weitz concluded that very little had changed since his parents took him out of Dartmouth and sent him to McLean. Even if privacy arguments had helped to secure a limited freedom to refuse treatment, the nation was not convinced that the mentally ill should be the ones making that choice.

4

Deregulation and the Future of Medicine

While some used *Roe* in a fight to change the treatment of mental illness, other social movements argued for a more complete revolution in health care. In fact, they believed that *Roe* had awarded patients a much more far-reaching form of control. In addressing sensitive data, civil libertarians and small-government conservatives formed a strained alliance. Far-right activists joined influential politicians and left-leaning proponents of holistic treatments in seeking to legitimize experimental therapies. While champions of alternative medicine questioned the wisdom of government involvement in health care, those defending information privacy proposed more regulations to guarantee patients' rights. *Roe* was not the cause of these activists' interest in privacy arguments. Nor did these advocates always mention the Court's decision when spotlighting a right to choose. Nevertheless, by understanding how these groups used *Roe,* we can see how differently the politics of privacy might have turned out. Together these activists described a new future for American medicine, putting the right to privacy at the center of a push to replace a system defined by expertise and professionalism with patient self-determination, risk-taking, and experimentation.[1]

Improbably, the fight for the future of American medicine sometimes revolved around a cancer drug that almost certainly did not work. In the 1970s, after decades of trying, the physicians, patients, and business people invested in Laetrile had no evidence that it was effective. Just the same, with two of three Americans diagnosed with cancer dying of the disease, a black market flourished. Manufacturers in Munich and Tijuana got their products over the border hidden in electronic equipment. Cancer victims smuggled Laetrile under their clothes. Although it was linked to the unpopular John Birch Society, proven ineffective, and tied to a strange criminal conspiracy, Laetrile had shocking success in the decade to come. Proponents convinced twenty-seven states to legalize the sale, manufacture, or use of Laetrile and pressured the government to oversee another round of clinical trials.[2]

The Laetrile wars began at a time of great instability in the law and politics of public health. A revived consumer movement demanded access to new products and protection from dangerous ones. With more care provided by nurses and other support staff, the deprofessionalization of medicine undercut deference to physicians. Revelations about the supposed hazards of everything from mushrooms to microwaves raised questions about whether the government understood when products were safe. Holistic solutions, including osteopathy and acupuncture, became more visible. These developments blurred the boundary between health care and other consumer goods.[3]

Americans also took fresh interest in novel treatments because of the spread of cancer. President Nixon first declared war against the disease in 1971, but for much of the decade, cancer seemed to have the upper hand. Convinced that orthodox medicine was not enough, alternative practitioners and patients sometimes invoked *Roe* in demanding a right to take care of themselves. After the deregulation of airlines, credit-card companies, and banks, many argued that health care should be next.[4]

At the same time, in the aftermath of the Watergate scandal, patients raised hard questions about power over sensitive medical information. Following a break-in at the headquarters of the Democratic National Committee, a congressional committee established that a conspiracy to steal sensitive documents and wiretap phones reached to the highest levels of the Nixon administration. Because the scandal involved a government attempt to gain access to access protected information, Watergate prompted a critical reexamination of the law and culture of information privacy. A right for patients

to have information privacy attracted bipartisan support in Congress, winning the sponsorship of legislators from conservative stalwart Senator Barry Goldwater (R-AZ) and his son, Representative Barry Goldwater Jr. (R-CA), to feminist Representative Bella Abzug (D-NY) and liberal Representative Ed Koch (D-NY).[5]

As a rhetorical instrument, *Roe* appealed to the diverse group of activists seeking to reinvent the medical system. The *"Roe"* invoked by activists did not always resemble the Court's decision. Like some in the abortion wars, activists framed *Roe* as a decision involving the rights of doctors and patients—an opinion recognizing the freedom to practice medicine and make crucial decisions about the course of care. Others picked up on understandings of *Roe* promoted by feminists, describing a right to choose that belonged to patients alone.[6]

In both cases, the Court's decision struck many activists as a valuable part of a broader rhetorical agenda. The decision arguably reconfigured the doctor-patient relationship by protecting the autonomy of patients. A wide variety of actors in the 1970s reworked the idea of equal treatment implicit in the Court's opinion, contending that the balance of power in medical care had to change. Perhaps most important, *Roe* connected privacy rights to the power to make important decisions. Those intent on creating a more consumer-centered system championed patient control over every aspect of medical care, from treatment options to the dissemination of medical records.[7]

These uses of *Roe* offer new perspective on the politics of privacy in the 1970s. Advocates interested in reinventing the medical system described the right to privacy in unexpected ways. Some sought to extend the principles of small government and individualism into new areas. Why should medical treatment be an exception to the apparent rule that free-market solutions worked better and expanded liberty? A variety of activists described medical consumerism as both an alternative to government supervision and the traditional doctor-patient relationship. They argued that the Constitution gave individuals the right to pursue unproven treatments and to dictate what happened to sensitive medical information.[8]

More left-leaning activists looked to *Roe* because they hoped to expose the relationship between leaked medical information and social and legal discrimination. To some observers, the 1973 decision implicitly recognized the

connection between autonomy and equality. They suggested that unless a woman could shape her own reproductive life, she would be unable to participate fully in the political, social, and economic life of the nation. Civil libertarians and their allies in Congress drew a similar connection between equal treatment and control over personal information. Maintaining that privacy and choice could not be fully separated from one another, these advocates sought to expose the often-hidden connections between the abuse of medical information and discrimination on the basis of race, sex, disability, or medical condition.[9]

The movement for control over medical information and treatment began in the 1970s. Activists pursued a two-pronged strategy, seeking federal and state legislation for patients and litigating in federal court. At first, movement members wove patient privacy into strategies centered on a right to control sensitive information. Civil libertarians first used this tactic in taking aim at the federal Bank Secrecy Act, a law requiring banks to keep records of large transactions. The ACLU argued that the statute deprived customers of control over information that could reveal their political preferences, personal liaisons, and much more. In 1974, when the Supreme Court rejected this effort in *California Bankers Association v. Shultz*, movement members asked Congress to establish a universal right to information privacy.[10]

But when Congress passed the Privacy Act of 1974, almost no one was satisfied. As a compromise, the law had created a variety of exemptions, including those for members of law enforcement and nongovernment actors such as corporations, employers, and doctors. To patients, these gaps were particularly troubling. To close them, activists and attorneys continued to work in Congress and the courts, this time demanding the recognition of a narrower right involving medical information. In *Whalen v. Roe*, the ACLU asked the Supreme Court to extend *Roe v. Wade* to cover patients' information privacy. From 1977 to 1979, Congress considered a series of bills that would have created rights like the one described by the ACLU in *Whalen*.[11]

Proponents of experimental therapies also developed a dual strategy. At the state level, activists campaigned for laws legalizing the manufacture and sale of Laetrile, acupuncture, and other unorthodox therapies. At the same time, movement attorneys challenged the constitutionality of the federal Food, Drug, and Cosmetic Act. Arguing that *Roe* had recognized a right for

patients to choose any course of treatment, movement members asserted that the Food and Drug Administration (FDA) no longer had the authority to regulate medicine.[12]

Those contesting the future of American medicine seemed to have persuasive reasons for relying on privacy arguments. Alternative-medicine champions hoped to make more headway in defending freedom of choice rather than singing the praises of questionable treatments. In the context of holistic medicine or sensitive information, abstract arguments about choice seemed to command the support of an ideologically diverse group of politicians and judges. Conservative activists, civil libertarians, and supporters of alternative medicine agreed that patients should have more control over their own health care.

Nevertheless, by the end of the decade, many of these groups had come to question the value of privacy rhetoric. Defeats in the Supreme Court made movement members second-guess their strategy. In 1977, in *Whalen v. Roe*, the Supreme Court upheld a New York law requiring the storage and computerization of information on patients who were prescribed drugs that were sometimes sold on the black market. Two years later, in *United States v. Rutherford*, the Court rejected a challenge to the FDA's decision not to approve Laetrile for sale. By 1980, no new states had legalized Laetrile or other unproven remedies, and Congress had not acted to protect patients' information privacy. It would be almost two decades before for there was any legal protection for medical privacy at the federal level, and there are deep ongoing concerns about data-privacy violations by marketers, credit-card agencies, members of law enforcement, and employers.[13]

As past uses of *Roe* show, widespread support for patients' privacy ran only so deep. Convincing politicians, voters, or judges of the importance of choice did nothing to eliminate the stigma surrounding certain illnesses, medical procedures, and treatments. Even those who supported medical freedom of choice often believed that sufficiently compelling government interests would overcome any right that patients could identify. The most passionate advocates for patient privacy discovered that they were fighting for very different things. For members of the ACLU, patient privacy mattered partly because it limited discrimination against gays and lesbians, minorities, and the poor. By contrast, right-wing activists and politicians saw the issue as a logical extension of the fight to limit federal power over business operations,

civil rights, and welfare. Disputes about the rationale for privacy rights helped to ensure that any revolution in the rights of physicians and patients would end before it had fully begun.

Information-Privacy Rights in Congress

Before becoming a plaintiff in a major constitutional case, George Patient was a union man. In the early 1970s, he learned that he had lung cancer and agreed to surgery to remove the tumor. After the operation, physicians prescribed Percodan for Patient's pain. The drug helped a great deal, but George Patient always worried that the word would get out. The last thing in the world he wanted was to be known as either a drug addict or a cancer sufferer.[14]

In the mid-1970s, technological breakthroughs, the spread of computer data banks, and the visibility of new spy gadgets made it seem virtually impossible for people like George Patient to keep information to themselves. The appetite for sensitive medical information seemed limitless. Credit agencies, employers, private businesses, and police officers wanted to know whether individuals took drugs, suffered from mental illness, or faced life-threatening diseases. For many, it seemed that George Patient had stumbled on an important constitutional question. If *Roe* protected a right to abortion, then surely it would reach the right to control information that could cost an individual her future.

Legal academics had studied a possible right to information privacy since the later 1960s, after the Supreme Court held in *Griswold v. Connecticut* (1965) that a Connecticut ban on the use of contraception by married couples violated a constitutional right to privacy. *Griswold* came down at a time when no one's personal information seemed safe. In the mid-1960s, scholarly and popular books on the "surveillance state" seemed to come out every year, and some estimates suggested that the government already held over 6 billion records. But the government was hardly the only offender. Probing life-insurance applications, embarrassing employment interviews, corporate spying, and exhaustive credit investigations exposed medical information to the eyes of strangers outside the government.[15]

In the mid-1960s, scholars who were worried about the surveillance state began developing constitutional arguments for a right to information privacy. Columbia Law School professor Alan Westin argued that the privacy right

recognized in *Griswold* reached "the claims of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about themselves is disseminated to others." Arthur Miller, a professor at Harvard Law School, argued that this right went to the very core of an individual's identity.[16]

The year that the Court decided *Roe,* the Watergate scandal transformed information privacy from a subject of academic inquiry into a political firestorm. The scandal broke when it came to light that burglars had broken into the headquarters of the Democratic National Committee, seeking to wiretap the committee's phones and steal documents. Soon, an investigation linked high-ranking officials in the Nixon administration to the break-in. Watergate was not the only breach of information privacy attributed to the administration. Nixon supposedly also signed off on an attempt to steal the medical records of Daniel Ellsberg, an activist responsible for leaking the top-secret Pentagon Papers. Watergate forced many to rethink how much control Americans had over sensitive personal information.[17]

The threat of more information leaks seemed immediate. In a 1974 report on the Federal Bureau of Investigation, the National Lawyers' Committee for Civil Rights under Law found evidence that law-enforcement officials abused their information collection powers and regularly relayed data to employers and insurance agencies. Because computerization made data easier and cheaper to store and share, the problem seemed likely to get much worse. Denouncing "Big Brother's data bank," the *New York Times* predicted that "[t]he defense of privacy will be one of the severest challenges of this era."[18]

Why did activists interested in privacy arguments use *Roe* as a vehicle? As privacy experts like Westin recognized, *Griswold*, the Court's 1965 decision on contraception and marital intimacy, arguably set out an idea of privacy that was just as malleable as the one in *Roe*. Furthermore, *Griswold* involved birth control—an issue much less divisive in the 1970s than the abortion right embraced in *Roe*. Nevertheless, *Roe* often struck movement members as the better weapon. The decision was not only more recent and better known. *Roe* also yoked privacy rhetoric to ideas about control and choice that seemed particularly salient in debates about personal information. Indeed, some leading academics and politicians working on information privacy concluded that "the Supreme Court's most significant pronouncement on the right to privacy is *Roe v. Wade*."[19]

To curb the abuse of sensitive information, activists initially turned to the courts. In 1973, ACLU attorneys experimented with the *Roe* decision in arguing that the federal Bank Secrecy Act violated a right to information privacy. The case, *California Bankers Association v. Shultz*, asked the Court to consider a law requiring financial institutions to record and report to law enforcement large financial transactions that might signal money laundering, tax evasion, or other financial crimes. A variety of plaintiffs challenged the law, including bank customers, financial institutions, and the ACLU. The plaintiffs worried about leaked information. After all, financial transactions could reveal a great deal about a person's political views, romantic affairs, and other secrets.[20]

In Court, the *Shultz* plaintiffs made many of the constitutional arguments developed by movement members. As Justice Blackmun's clerk recorded, the ACLU's amicus curiae brief primarily argued that the Bank Secrecy Act violated the Fourth Amendment's prohibition on unreasonable searches and seizures. However, ACLU attorneys also argued that *Roe* and related cases reached individuals' interest in information privacy. The clerk summarized this argument as follows: "the Court should extend the right to privacy [recognized in *Roe*] to individual's financial affairs and records thereof."[21]

The Court's 1974 decision in *Shultz* canvassed many of the leading constitutional strategies for recognizing a broad right to information privacy. Some hoped to build a case for information privacy based on the Fourth Amendment because it protected those with reasonable expectations of privacy against unreasonable searches and seizures. Alternatively, some looked to the First Amendment's guarantee of free association. In *NAACP v. Alabama* (1958), the Supreme Court had held that members of an organization had a right to prevent compelled disclosure of their members' identities. Perhaps that case had implied a right to control personal information that would discourage an individual from joining political organizations.[22]

Issued in April, the Court's *Shultz* opinion undercut the potential of both Fourth and First Amendment strategies. The majority first concluded that if a bank complied with the Bank Secrecy Act there would be no violation of customers' rights because the banks themselves owned and created the records covered by the law. Customers had no privacy interest in documents over which they had never had a say. Moreover, as the Court saw it, the statute did not change the rules governing access to sensitive records. Merely man-

dating that certain records be made and stored did not rise to the level of an unconstitutional search. Nor did the Court find a First Amendment argument persuasive. Because the government had not yet sought the disclosure of sensitive records, the Court concluded that the First Amendment challenge was premature.[23]

While unconvinced by many of the constitutional arguments for a right to information privacy, the Court had not mentioned *Roe* or the decisions leading to it. Because the justices had not foreclosed these arguments, many saw *Roe* as the foundation for a strategy that homed in on patients' rights. The ACLU continued bringing test cases, but many turned to state legislatures and Congress for reasons that seemed sound. *Shultz* had made litigation seem less promising in the near term, and movement members faced an additional hurdle in the Court's state-action doctrine. For decades, the Supreme Court had allowed for constitutional challenges only against the government and its agents. Because many doctors worked in the private sector, constitutional solutions were limited. And patients had no recourse against bankers, creditors, employers, and business owners who sometimes trafficked in sensitive information.[24]

Given the Court's limited definition of state action, privacy advocates sought out allies in Congress. Representatives Ed Koch (D-NY) and Barry Goldwater Jr. (R-CA) put forward a bill that awarded patients more control over medical records. Privacy in the medical context commanded attention because few states already protected it. Koch and Goldwater Jr. recognized that some of the rights called for in other contexts, like the right to correct records, might make less sense when patients encountered complicated medical documents. Nevertheless, the idea of greater control over medical records won the support of those who represented both political extremes in Congress at the time.[25]

Shortly after the Court's decision in *Shultz*, Goldwater Jr., widely regarded as one of the most conservative members of Congress and a champion of right-wing insurgent Ronald Reagan, worked with the liberal Koch to close the constitutional gap many believed that the courts had created. Rather than focusing on medical issues, Goldwater Jr. and Koch ultimately promoted an omnibus privacy bill. Key sponsors of federal legislation on the subject explained that a statute would safeguard federal constitutional rights to information privacy. Senator Abraham A. Ribicoff (D-CT) deemed it "essential that

our basic constitutional principles guide us in this area." Goldwater Jr. agreed, emphasizing: "The courts need help, and Congress is in a position to help them."[26]

In framing a constitutional justification for the Privacy Act of 1974, most grassroots activists described a generic idea of autonomy not specifically anchored to the constitutional text or to any Supreme Court precedent. Those who did detail the nature of a right to privacy often referred to *Roe,* but in doing so, departed both from the Supreme Court's original decision and from the interpretation often promoted at the time by supporters of legal abortion. The *Roe* decision had emphasized rights for both physicians and patients. While some abortion-rights advocates stuck to this interpretation, others identified *Roe* with a woman's right to choose. Those supporting a right to information privacy argued instead that *Roe* recognized a right for patients alone, one that involved control of important life decisions. These advocates claimed that if an individual had no say about what happened to her most sensitive personal information, the right to patient privacy was a sham.

The National Governors' Conference argued that "recent cases which expand upon *Roe v. Wade* indicate that the right to privacy as a constitutional concept is a viable and growing concept whose time has come." Senator Barry Goldwater Sr., who became a vocal champion of his son's proposal, tied *Roe* to movement conservatives' analysis of the right to privacy. Senator Goldwater even proposed his own bill on the subject in the Senate. The Liberty Lobby, a far-right group known for its war on the Internal Revenue Service, contended that an ever-expanding bureaucratic state threatened the right to privacy. "It is in the nature of the bureaucrat to wish to control and regiment, and he desires . . . a society where there is no individualism," a representative of the group testified. Invoking fears that big government would force individuals to change their beliefs or conduct, Senator Goldwater echoed this description and tied it to the 1973 decision, citing *Roe* as evidence of "the inviolability of the human personality."[27]

Congress passed the Privacy Act of 1974 in December. The law prohibited any federal agency from disclosing information without an individual's consent, gave individuals a right to access government records, and allowed individuals to pursue civil claims against government actors who violated the statute. But for many, the exceptions written into the bill made its promise far from complete. As an initial matter, the law did not reach leaks by non-

government actors, including doctors, hospitals, insurance and credit agencies, and employers. Even government agencies were exempt from the act under several circumstances. Law-enforcement requests fell outside the scope of the act, as did "routine uses" of sensitive information and matters pertaining to the health and safety of an individual. "Routine use" could sweep quite broadly: Congress defined such a use as one compatible with the reasons a record was originally collected so long as the reason was published in the Federal Register. It seemed that the government could justify almost any use of records simply by publishing it. For civil libertarians and conservative activists alike, these exceptions came to seem increasingly troubling, particularly in the context of patients' rights.[28]

In 1976, a group of prestigious medical bodies, including the American Association of Pediatrics, formed a new organization to expand protections for patients. In July, Bella Abzug and other members of Congress again put the issue in the spotlight in the wake of revelations about a psychiatric clinic in upstate New York. Clinic employees reported that the state had threatened to withdraw funding if a regional contract manager for the State Office of Drug Abuse could not review all patient records.[29]

In the mid-1970s, the issue of patient privacy captured the attention of activists and politicians across the ideological spectrum because leaked medical information could devastate almost anyone. Some abuses of information fell particularly heavily on minority communities. In the 1970s, for example, several states introduced mandatory or voluntary screening for sickle-cell anemia, a genetic condition disproportionately affecting people of African or Mediterranean descent. The programs lacked adequate confidentiality protections and reportedly caused employers, including private airlines and the United States Air Force, to discriminate against African American applicants or bar them altogether.[30]

However, rising rates of cancer and heart disease affected Americans from all economic and racial groups. Deaths from cardiac disease peaked in the late 1960s and early 1970s, and cancer appeared likely to exact a heavy toll. While the mortality rate for all cancers varied by race, leaked information about the disease hurt workers regardless of race, religion, or class. A study sponsored by the California Division of the American Cancer Society tracked the work experiences of cancer survivors over a five-year period. Fifty-four percent of white collar and 84 percent of blue-collar workers reported facing

discrimination because of the disease. Control over sensitive medical information mattered to politicians and grassroots activists with very different policy preferences because the threat of disease-based discrimination was all too real for every American.[31]

Notwithstanding the broad appeal of information privacy for patients, ACLU leaders and their allies in the mid-1970s saw control over information as a civil-rights issue. *Roe* seemed to be a logical symbol for those explaining the stakes of information privacy. Many feminists read into the decision a link between autonomy and equality for women only implicit in the Court's opinion. ACLU members identified a similar relationship between control over medical information and equal treatment. Trudy Hayden, a prominent ACLU member and contributor to the *Privacy Report*, a publication focused on related issues, asked whether "the requirement that [job] applicants submit detailed medical and psychological histories [was an] invasion . . . of privacy." Members of the ACLU Due Process Committee believed that the abuse of sensitive information thinly concealed bias against women, minorities, gays and lesbians, and the poor. Committee members argued that application questions about abortion or venereal disease "might really be aimed at screening out applicants with undesirable lifestyles," while questions about sickle-cell anemia might serve to "screen . . . out black applicants."[32]

ACLU members identified two independent connections between medical privacy and equal treatment. As it gradually became less acceptable for employers and government actors to openly discriminate on the basis of race, sex, or even sexual orientation, exploiting medical information would allow them to accomplish the same goal in a less controversial way. Some activists believed that abortion restrictions had a similar purpose: by preventing women from controlling their own fertility, lawmakers could keep women "in their place" without ever formally explaining their goal. The ACLU suggested that much as equality and autonomy intersected in the abortion context, equal treatment for the disenfranchised could not be separated from the control of medical information.[33]

While working in Congress, the ACLU continued pursuing litigation. In the mid-1970s, the group brought a challenge all the way to the Supreme Court, finally putting the question of patients' control over information squarely before the justices. The organization's strategy shed light on how

civil libertarians defined patients' rights as a matter not only of self-determination but also of equal treatment.

Litigating a Right to Information Privacy

The litigation in *Whalen v. Roe* began when the New York Civil Liberties Union (NYCLU) challenged a state statute requiring physicians prescribing legal drugs designated as "dangerous" to provide certain information to the Department of Health. Bureaucrats at the department then logged, coded, and processed the information by computer. But what if that information got into the wrong hands? When physicians prescribed children controversial drugs like Ritalin, some parents refused treatment, worrying that leaked information would brand their children as outcasts. A handful of doctors reported that they sometimes avoided prescribing drugs covered by the law even if they would be the most effective. When the federal district court struck down the statute, a spokesman for the NYCLU described the decision as a landmark victory for the privacy of patients.[34]

When the Supreme Court agreed to hear the case, the national ACLU elaborated on constitutional arguments for information privacy developed earlier in the decade. Attorneys and grassroots activists working in the organization had already tested several arguments linking *Roe* to patients' control over information. Earlier, ACLU attorney Sylvia Law relied on the "patient's right to control his or her body" tied to *Roe* in outlining a litigation program to defend the interests of nursing-home patients. The *Privacy Report* also looked to *Roe* for answers to what many ACLU members saw as the biggest challenge facing information privacy rights in the courts. In the Fourth Amendment context, the Court had reasoned that individuals did not own the secrets contained in their personal files. If anyone had an ownership interest in personal information, it was the organization creating a record. ACLU members believed that *Roe* had defined self-ownership and self-control in a very different way. The *Privacy Report* asserted that "in fashioning rights of personal integrity and domestic privacy in contraception and abortion decisions," the Court freed "privacy from property rights in several important areas." Activists suggested that under *Roe* an individual patient had the final word on what happened to her life or to her body, regardless of who

technically owned what. They believed people should have the same right to control their personal information.[35]

Building on this argument, John Shattuck, a leading voice for patient privacy in the ACLU, and the other authors of the group's brief first asserted that constitutional privacy covered control over information. Unlike activists in the political arena, the brief looked to popular and legal interpretations of *Roe* involving rights for both patients and physicians. The ACLU pointed to language in *Doe v. Bolton*, *Roe*'s companion case, describing a "woman's right to receive medical care in accordance with . . . the physician's right to administer it." In the context of sensitive information, the Constitution similarly "recognized the patient's right to receive medical care in accordance with her licensed physician's best judgment [and] the physician's right to practice."[36]

The challenge for these advocates was to explain how *Doe* and *Roe* covered confidential information. Even in Shattuck's analysis, either decision involved only a right to receive and provide medical care, not a right to control data. ACLU lawyers first attacked this problem by arguing that violations of information privacy irreversibly compromised doctors' rights to deliver treatment. Because of potential leaks, physicians and patients might make different—and less effective—medical decisions.[37]

Although the ACLU relied partly on a right for doctors to provide treatment, the brief suggested that patients could not rely exclusively on their care providers to safeguard sensitive information. In this way, the ACLU reworked feminist interpretations of *Roe*. Although *Roe* had assigned a privacy right to patients and physicians, feminists suggested that *Roe* recognized a right to choose for women. Shattuck did not describe the privacy right in *Roe* as a matter of sex equality. But even while focusing on the medical context, Shattuck drew on feminist arguments that patients required independence from their doctors. According to Shattuck and his colleagues, patients needed constitutional rights to control information because doctors alone would not always ensure that information was not leaked. The brief argued that *Roe* had recognized that certain medical issues, if made public, could hurt a person's career, family, or reputation. Because of the stigma surrounding certain procedures and conditions, collecting sensitive information could discourage people from pursuing the treatment they needed. The brief reminded the justices that they had "been most careful to protect individual anonymity

where compelled identification will tend to discourage lawful activity," including abortion.[38]

The ACLU brief also explained the potential intersection between autonomy and equal treatment for patients. *Roe* and *Doe* arguably recognized such a relationship in the abortion context, and the *Whalen* brief identified a similar pattern related to information privacy. The ACLU told the stories of patients who rejected recommended medication because they feared the discrimination that could result if the information fell into the wrong hands. In this analysis, control over sensitive medical information mattered because individuals seeking equal treatment would never find it if others could leak intimate information about their lives.[39]

In February 1977, when the Court issued its decision in *Whalen,* the ACLU's loss hardly seemed to be the final word on patients' rights to information privacy. As framed by Justice John Paul Stevens's majority opinion, *Whalen* was a narrow decision focused on the details of the New York law. The state had put security measures in place to prevent leaks. Any threat, Stevens reasoned, came from either a failure to follow security protocols or a willingness to use the stored evidence in a court proceeding. Neither risk would justify invalidating the entire New York law.[40]

The majority opinion offered hope for those seeking to litigate to protect patients' information privacy. Acknowledging "the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks," *Whalen* suggested that the government's duty to avoid certain unwanted disclosures "arguably ha[d] its roots in the Constitution." Instead of rejecting the idea of a right to information privacy, the Court merely concluded that the record in the case did "not establish an invasion."[41]

Although litigators did not give up on the courts after *Whalen,* Congress seemed more promising. Lawmakers considered a different bill on medical records almost every year. Nevertheless, by 1980, none of these proposals had made any progress. It turned out that bipartisan consensus about patient privacy was little more than an illusion. While everyone agreed that patients should have the right to control their own information, politicians held diametrically opposed ideas about who the victims and perpetrators were in the new surveillance state.

Clashing Visions of Information Privacy in Congress

In 1977, a government-sponsored commission headed by privacy scholar Alan Westin delivered the results of a two-year study on patients' rights. For champions of patients' privacy, the news was not good. The study collected extensive evidence that nonmedical actors routinely misused patients' information. Nurses reportedly gave out confidential details about patients to employers, insurance agencies, and others uninvolved in their medical care. Some even reportedly read medical records aloud over the phone.[42]

In December 1978, in the aftermath of the Westin study, President Jimmy Carter considered three reports on the threat to privacy, including one focused on patients. The following April, he proposed his own bill, and lawmakers held several rounds of hearings on the so-called Federal Privacy of Medical Records Act, a law cosponsored by Goldwater Jr. and Representative Lunsford Preyer (D-NC). The proposal borrowed from the ACLU's idea of a shift in the balance of power between physicians and patients, explaining: "medical information about an individual is routinely made available for public and private uses not directly related to the provision of medical services." The bill also hinted at the connection between discrimination and information privacy raised by the ACLU, explaining: "In order to prevent unfairness from the misuse of medical information, the individual must be able to exercise more control."[43]

But by 1980, it was clear that any consensus about patients' right to information privacy was falling apart. A broad cross section of supporters began identifying state interests that justified limits on the right to information privacy. The range of purposes set out by activists and politicians brought to light longstanding differences about why the Constitution should protect patients' right to information privacy.

Barry Goldwater Sr., Goldwater Jr., and the activists attracted to their agenda first bridled at the idea of privacy rights enforceable against private businesses. Goldwater Sr. had originally appealed to constituents worried about a growing bureaucratic state. Voters resentful of new civil-rights regulations and welfare entitlements believed that a loss of privacy inevitably accompanied the expansion of the federal government. Testifying before Congress in 1974, Goldwater Sr. explained his support for a constitutional right to information privacy in these terms: "A welfare-statism society, in

order to control its members, needs information." Goldwater Jr. also portrayed those who resisted new civil-rights protections as victims of a new attack on privacy. At a speech at a computer-science conference, he told the story of a school official in Georgia who allegedly threatened a black family seeking to integrate a school with the loss of their farm. He reasoned that because the information was in a government file the news could have leaked. While insisting that the story was false, Goldwater Jr. saw this official as the quintessential example of how information-privacy violations could "do great harm."[44]

Goldwater Sr.'s constituents echoed this view. One voter agreed that "ultra-liberal" activists and politicians had sponsored an attack on patients' information privacy. Another voter angry about the expanding use of Americans' Social Security numbers argued that invasions of information privacy had paved "the road to riches for special groups," particularly those receiving "Medicare, Medicaid, Social Security, and Welfare Funds." Virtually every correspondent echoed Goldwater's defense of "the right to be let alone by Big Brother in all of his guises."[45]

Senator Goldwater, his son, and their allies hesitated to expand patients' information privacy rights when doing so might impose new costs on businesses and consumers rather than on the federal government. One voter concerned about information privacy worried that extending controls to hospitals and other private actors would dramatically increase consumer costs. Although he was invested in privacy protections, Goldwater Sr. voiced similar worries about "business considerations."[46]

Senator Goldwater's supporters also thought twice about extending information-privacy rights in the context of crime control. In his failed 1964 presidential campaign, Goldwater had vowed to get "tough on crime," carving out a strategy later borrowed by Richard Nixon and Ronald Reagan. Racially charged arguments about urban crime galvanized conservatives in the decade after his presidential run. Just the same, Goldwater initially backed efforts to extend patients' rights to cover law-enforcement agencies, and his supporters voiced anger at the CIA after the Church Committee (officially, the United States Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by Senator Frank Church [D-ID]) exposed extensive surveillance of civilians, civil-rights activists, and other progressive organizers. But as the decade progressed, public perception

of a violent crime wave made it harder for grassroots conservatives to endorse any limit on the investigative powers of law enforcement.[47]

As public anxieties about crime control increased, conservatives questioned the wisdom of certain privacy protections for patients. Several prominent cases involving mental patients reinforced claims that patients' privacy rights already left the public with too little protection. In the late 1970s, reporters covered litigation involving Prosenjit Poddar, a graduate student at the University of California, who had murdered fellow student Tatiana Tarasoff after discussing his homicidal fantasies with a psychotherapist. In December 1979, another mental patient, Adam Berwid, stabbed and killed his wife during an approved furlough from Pilgrim State Hospital in Long Island. Like Poddar, Berwid had told his therapist about a desire to murder his victim beforehand. Cases like *Tarasoff* struck a chord with politicians and voters worried that information privacy rights left the public at risk.[48]

By contrast, ACLU activists and their allies in Congress fought primarily for the information privacy of minorities victimized by some businesses or members of law enforcement. Abzug spoke particularly forcefully about violations committed by major companies, condemning the "secrecy which is designed to strengthen private monopolies that are already exerting too much power over our economy." John Shattuck similarly framed patients' information privacy as an equality issue. "The effect of government record-keeping on persons who are poor, or persons who are mentally ill, or who have police records, or some other social or economic disability," Shattuck stated, "is the creation of a permanent class of people who are branded for life by their disabilities, or their minority or non-conforming status."[49]

Nevertheless, ACLU members joined a larger debate about the balance between privacy rights and equal treatment on the one hand and freedom of expression on the other. In the late 1970s, members of the press criticized limits on investigative reporting that were imposed by new state privacy laws. Reporters expressed concern about their inability to access medical or arrest records. Journalists sometimes argued that these regulations kept some of the worst acts of discrimination from ever coming to light. The ACLU Privacy Committee soon entered into a heated discussion about the proper balance between information privacy and the "right to know." As early as October 1977, the committee could not reach consensus about when the freedom of the press should trump the right to privacy.[50]

By the later 1970s, it became obvious that those who shared a commitment to patients' privacy agreed neither on how far such rights went nor on why they mattered. Whereas small-government conservatives contended that police officials and private businesses should not have to bear the costs tied to broad information privacy rights, civil libertarians worried primarily about abuses by major corporations, employers, and law-enforcement agents. As long as the coalition pushing for patients' rights was in disarray, meaningful progress seemed unlikely. At the same time, activists on both the right and left pushed for exceptions to privacy rights that undermined demands made in either Congress or the courts.

In 1979, when Carter endorsed patient privacy, common ground already seemed hard to find. By April 1980, medical issues had fallen out of the president's bill, which covered only insurers and credit agencies. Critics charged that it would do very little at all. Violations counted only if a claimant could prove they were intentional—a high bar that few would be able to clear. Congress did not introduce meaningful protection for medical privacy until 1996 when lawmakers passed the Health Insurance Portability and Accountability Act.[51]

The movement for information privacy had set out novel ideas about what the Constitution protected. At a time when credit-card companies and airlines were deregulated, attorneys, politicians, and grassroots activists believed that American medicine should change in the same way. While sometimes tying *Roe* to a physician's right to practice medicine, movement members implied that the law could not always trust doctors with their patients' most sensitive information. Patients needed rights of their own to ensure that they did not face discrimination on the basis of disability, race, lifestyle, or medical condition.

Nevertheless, those convinced of the need for information privacy did not share a vision of why the right mattered or who was most likely to violate it. These divisions made it difficult to overcome the hurdles in the way of patient-privacy legislation, obstacles including the resistance of medical professionals to the cost, paperwork, and curbs on research some believed would accompany a new privacy bill.

At the end of the 1970s, other grassroots activists, attorneys, and alternative medical providers used the right to privacy to advance a very different idea of patients' rights. Rather than seeking control over information, these

advocates demanded access to unproven remedies. Some drew on an interpretation of *Roe* common in the abortion politics of the day, describing a right that doctors and patients could exercise together. Others defended a right to choose, transforming a feminist reinterpretation of the decision.

These advocates argued that health care was no longer the government's business. They articulated an expansive vision of medical consumerism. If Americans in the 1970s had more of a say about the cost or choice of products, why did the government deny them power over the life-and-death decisions that defined medical treatment? How could the medical establishment deny consumers choice when a disease was incurable or poorly understood? *Roe* proved to be a valuable weapon to activists asking these questions, and for some time they hoped for a very different future for American medicine.

The Cancer Underground and Patients' Rights

The movement for alternative cancer treatments first made a political mark in 1972 when Dr. John Richardson, a member of the far-right John Birch Society, faced smuggling charges. Richardson had operated a general medical practice in San Francisco since the 1950s, but in 1971, he began offering alternative cancer treatments. A year later, federal law-enforcement agents arrested Richardson for carrying Laetrile over the U.S.-Mexico border. Richardson's friends in a local John Birch Society chapter responded to the charges by forming the Committee for Freedom of Choice in Cancer Therapy (hereafter, the Committee) to raise $20,000 for his legal defense. In its fundraising materials, the Committee insisted that the government had abused its power by banning the drug. Before the Supreme Court decided *Roe,* the Committee already used abstract ideas about choice to attack the size of the federal government and the regulation of medicine. Nevertheless, after the Court's abortion decision, the Committee and its allies made *Roe* and related claims a central part of the fight to deregulate cancer treatment.[52]

By the time of Richardson's first trial, the origins of Laetrile were already obscure. Invented by pharmacist Ernst Krebs Sr. at some point between 1938 and 1951, Laetrile was a substance extracted from apricot pits. Krebs and his son, Ernst Krebs Jr., a medical school dropout, claimed that Laetrile cured cancer. The two found a champion for their product in Andrew McNaughton, the wealthy son of a famous Canadian general. McNaughton's recently

formed eponymous foundation began publicizing Laetrile, putting out a book and magazine article touting the effects of the drug.[53]

McNaughton found an audience in the early 1970s when a new climate of fear took shape around cancer. Philanthropist Mary Woodward Lasker, a veteran anticancer lobbyist, spearheaded a public relations campaign in the late 1960s around the idea that the government could put a stop to cancer if Congress would commit to funding new research. In 1969, Lasker took out a full-page ad in the *Washington Post* stating in no uncertain terms that President Nixon could cure cancer if he chose to.[54]

Lasker's publicity blitz sharpened public anxiety about the dangers of cancer and the inability of physicians to do anything about it. In 1970, the McNaughton Foundation capitalized on this anxiety by submitting an Investigational New Drug (IND) application to the FDA to study Laetrile. The agency refused because there was no preclinical evidence suggesting that the drug would help patients. With no sign of progress in the war on cancer, Nixon signed the National Cancer Act into law in 1971, authorizing hundreds of millions of dollars for cancer research in each of the next three years. In this climate of public unease, interest in Laetrile stayed alive. A year later, Memorial Sloan Kettering Cancer Center (MSKCC), a preeminent New York hospital, conducted clinical trials on the drug. Although initial tests conducted by scientist Kanematsu Sugiura found that Laetrile inhibited the growth of secondary tumors, other researchers could not replicate Sugiura's results, and MSKCC conducted a follow-up study which found that Laetrile had no beneficial effect.[55]

In spite of doubts about the efficacy of Laetrile, interest in the drug intensified. Some of those who swore by Laetrile connected belief in alternative treatments to evangelical Christianity, asserting that conventional medicine alone would not solve every problem. Others saw Laetrile as a natural extension of holistic therapies, like acupuncture, increasingly popular on the West Coast. Still others, like Richardson, came to the cause from far-right organizations and described drug regulations as just one more abuse of federal power. The International Association of Cancer Victors and Friends (IACVF), a group advocating for Laetrile access, drew on many of these sources of support when it organized in the early 1960s. Cecile Hoffman, a San Diego school teacher, started the organization after concluding that Laetrile had halted the progress of her cancer. IACVF operated primarily as a

support group and clearinghouse for information on alternative-cancer therapies—what members called "a non-profit, tax deductible organization primarily interested in disseminating educational information and supporting research."[56]

In 1973, after the *Roe* decision, leaders of the organization's Los Angeles chapter broke away to form a more law-oriented group, the Cancer Control Society (CCS). Betty Morales of CCS and her allies emphasized an interpretation of *Roe* already supported by some in the abortion-rights movement, invoking the right to choose. Before 1973, movement members had borrowed choice arguments from abortion politics. But after 1973, the right to choose became a more prominent argument. As Morales explained: "We are trying to force the government to allow freedom of choice in cancer therapy, relating particularly to Laetrile." CCS members highlighted a right to choose when claiming that cancer patients, like women choosing abortion, should be allowed to make decisions that affected them more than anyone else. As the organization's promotional materials put it: "We believe it is necessary for laymen to put checks and balances on the medical monopoly."[57]

Although CCS and IACVF sometimes struggled to recruit new members, both groups helped to create a more diverse base of support for controversial cancer remedies. Whereas the Committee often welcomed conservatives, members of CCS and IACVF shared an experience with cancer but otherwise came from different classes and political perspectives. At the Fort Lauderdale chapter, for example, bankers and lawyers worked closely with homemakers and blue-collar workers in lobbying, educating the public, and trading information about access to Laetrile.[58]

By the mid-1970s, members of all three groups looked to *Roe* as an important weapon in the war against the FDA. Some in the Committee and IACVF had referred to the Constitution before 1973, and the Committee defined its cause as an extension of choice. Nevertheless, after the *Roe* decision, members pointed more specifically to a right protecting the physician-patient relationship. Looking to *Roe,* CCS called on Americans to fight for "the right of a cancer patient and her family to freedom of choice in medical treatment." In a 1977 pamphlet, the Committee vowed to "prohibit the interference of the government . . . in the sacred relationship between the informed patient and his duly licensed physician" and to "inform people of their legal rights and any attempts to abridge these rights to Freedom of Choice."[59]

Notwithstanding the controversy surrounding abortion, champions of medical consumerism thought that *Roe* would advance their cause. In that case, the Court had limited the government's regulatory authority, even though abortion divided the larger society. Laetrile proponents cited *Roe* in arguing for the right to access any medical procedure, no matter how controversial it was. Moreover, *Roe* described privacy partly as a matter of choice. Champions of medical consumerism seized on the decision to argue that the right to choose logically extended to any decision patients made.

In experimenting with arguments based on the right to privacy, Laetrile proponents developed a two-part strategy to challenge the authority of the FDA. First, movement attorneys developed test cases in the state and federal courts, arguing that under *Roe* patients had the right to choose even controversial treatments. In legislatures across the country, politicians used related reasoning. Arguments based on the right to choose allowed the Laetrile movement to convince politicians who agreed on little else, from feminists and populist Democrats to small-government conservatives. While the medical establishment convincingly insisted that Laetrile had never helped anyone, almost half the states in the nation embraced what many saw as a patient's right to choose.

The Laetrile Litigation

The constitutionality of the FDA Laetrile ban first came before the courts in the early 1970s because prosecutors continued treating Laetrile as a controlled substance. But by the mid-1970s, some of the movement's more ambitious attorneys identified the *Roe* decision as the cornerstone of an overarching plan of attack. Rather than developing a different strategy for each individual case, Laetrile supporters could cast doubt on the constitutionality of FDA regulations that applied across the board. By mid-decade, enthusiastic about the potential of a constitutional strategy, movement lawyers went on the offensive, launching a class-action lawsuit designed to guarantee broad access to the drug.

The impact of *Roe* quickly became the core point of contention for those on either side. In defending the Laetrile ban, bureaucrats and doctors argued that *Roe* did nothing to stop the government from regulating medicine. Instead, the Court had recognized a woman's right to choose only because abortion

was proven, safe, and effective. These advocates argued that patients had no equivalent right to seek out dangerous drugs or placebos. By contrast, Laetrile supporters argued that *Roe* had recognized a right of patients to make all of their own medical decisions, including those of which society did not approve. In 1973, the Court had set the stage for the deregulation of medicine.

These arguments took shape first when doctors who were illegally providing Laetrile scrambled to mount a defense against criminal charges. Early in the decade, many of the physicians facing criminal charges in Laetrile cases turned to George Kell, a lawyer who would play a defining role in litigation on the issue. He had worked as a deputy attorney general in California before opening a criminal defense practice in Modesto. Before his involvement, CCS had primarily educated members about how to avoid prosecution under existing law, but Kell invited grassroots activists to challenge the FDA regulations more directly. In a booth at the group's 1974 convention, Kell promoted his new legal strategy. He promised attendees that the judiciary might soon put an end to the legal obstacles the movement faced. Kell pointed to *Roe* as evidence of "the courts' attitude toward the right of a patient to request and receive any form of treatment." At the event, Dr. James R. Privitera Jr., a future client of Kell's, echoed the lawyer's optimism. He argued that the right recognized in *Roe* would bar "any attempt by the government to inject itself into the doctor-patient relationship."[60]

In his first several cases, Kell shied away from the bold constitutional strategy he had sold to CCS members in 1974. When the California State Medical Board launched an investigation of Dr. Stewart Jones for providing his patients with Laetrile, Kell insisted that his client was not treating cancer at all. Describing the drug as a nutritional supplement, Kell helped Jones avoid conviction for all but one of the charges he faced. Similarly, when initially representing Dr. Richardson of the Committee, Kell reasoned that "the doctor's use of Laetrile for nutritional purposes [did] not constitute the treatment of cancer." With *Roe v. Wade* available as a weapon, however, Kell clearly began to hope for more. He wrote Committee members that Dr. Jones's conviction represented "an invitation and an opportunity for the Court to declare the [FDA] statute unconstitutional." On what basis would Kell challenge the law? Again drawing on *Roe,* he stressed "the right of privacy between the physician and the patient respecting the choice of medical remedies."[61]

In 1975, the Laetrile movement found several vehicles for these constitutional claims. Drs. Richardson and Privitera both had to defend themselves against criminal charges, and lawyers like Kell argued that the laws used to prosecute them violated a constitutional right recognized in *Roe*. After a partner at his law firm was stricken with cancer, Clyde Watts, a conservative former general, brought a class-action suit on behalf of cancer sufferers, asking for an injunction to prevent the FDA from enforcing the Laetrile ban. In justifying his request, Watts argued that the ban violated the due process clause of the Fifth Amendment, depriving patients of the right to control medical treatment recognized by *Roe*.[62]

At first, government officials and members of the medical establishment dismissed the constitutional issues raised by Kell and Watts as a sideshow, saying that what mattered was that Laetrile was useless at best. Sherwin Gardner, a deputy commissioner for the FDA, wrote a letter to the editor of the *New York Times* emphasizing that Laetrile victimized patients by wasting their money and dissuading them from seeking other treatment until it was too late. Dr. George Rosemund, then-president of the American Cancer Society, described a role for physicians very different from the one articulated by Laetrile champions. Rosemund contended that rather than catering to patient demands, doctors had a responsibility to "[p]rotect the public against all worthless remedies for illness."[63]

By the mid-1970s, however, members of the Laetrile movement forced their opponents to discuss the Constitution. In Oklahoma, Watts asked the federal district court to enjoin the Laetrile ban on constitutional grounds. The court granted Watts's request, and a year later, the Tenth Circuit Court of Appeals affirmed the ruling without addressing the constitutional questions raised by the suit.[64]

Watts's litigation in *United States v. Rutherford* involved a variety of thorny statutory questions unrelated to the Constitution. First, attorneys fought about what exactly Laetrile was. The Food, Drug, and Cosmetic Act regulated only drugs, a term defined by statute to include "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease." By the mid-1970s, Laetrile proponents consistently argued that it was little more than a vitamin and was therefore exempt from the requirements of the act. Although Kell had previously had success with this argument, the federal

courts saw no merit in it. Given that proponents claimed that Laetrile helped cancer patients, federal law would clearly treat it as a drug.[65]

Even attorneys who argued that Laetrile was a drug disagreed about whether it was new. The Food, Drug, and Cosmetic Act exempted substances from the law's control if the drugs were not "new"—that is, if physicians had commonly used them before the statute's most recent amendment. Watts claimed that Laetrile had been widely accepted in the medical community before the act passed and therefore did not count as a new drug. This argument worked at the trial court level, where a judge held that the FDA had not yet justified its findings about Laetrile. Encouraging the FDA to revisit the issue, the Tenth Circuit upheld the injunction issued by the district court.[66]

Although the Tenth Circuit did not rely on the Constitution in reaching a decision, the *Rutherford* litigation still had forced the government to address whether patients had a right to choose their course of treatment. "As the law now stands, people have no right to freedom of choice of drugs," insisted counsel for the United States at oral argument at the Tenth Circuit. "If they did, marijuana and heroin and a whole range of other drugs would be legal." The United States attorney did not argue that *Roe* recognized no rights for patients. Instead, the argument went that the Court had recognized a right only to choose treatments recognized as safe and effective by the medical establishment and by federal regulators.[67]

In state court, supporters of Laetrile pushed back, building alliances with other alternative-health organizations, including the National Health Federation (NHF). NHF was controversial from the start. Fred J. Hart, a man best known for pushing radio waves as a cure for disease, founded NHF to lobby for remedies many rejected. In the 1960s and 1970s, NHF reframed its cause, advocating for patients' right to determine their own course of treatment. The group questioned the safety of substances on which the FDA had signed off, particularly fluoridated water. NHF members had more success when calling for access to substances the FDA prohibited. In 1973, when the FDA introduced regulations limiting the number of vitamins that consumers could purchase at one time, the NHF successfully convinced Congress to pass a bill overturning it. The group also profited from controversies surrounding the FDA, some of them stemming from a proposed ban on the popular sweetener saccharine. Backed by health-food stores, the NHF grew rapidly,

uniting with alternative providers, including those with osteopathy or acupuncture practices.[68]

With support from groups like the NHF, members of the Laetrile movement took more aggressive steps. Across the country, movement members pushed for laws legalizing the manufacture, sale, or use of the drug within state borders. While the FDA could regulate interstate traffic in Laetrile and other unproven remedies, some legislators hoped to create a refuge for patients seeking controversial treatments. As debate moved into state legislatures, arguments about *Roe* evolved. Used as a tool by voters, legislators, and activists, these claims multiplied, serving the needs of those with clashing views on abortion, alternative medicine, and even the Equal Rights Amendment (ERA). In spite of deep doubts about the value of Laetrile, legislators and voters across the political spectrum identified with patients' rights to select any treatment they wished.

Laetrile in State Legislatures

In a very short period, states rushed to legalize Laetrile, with almost half the legislatures in the country passing such a law in the second half of the 1970s. Some legislators and voters believed that they were fighting for an effective cancer cure, but even many who questioned the efficacy of the treatment still battled to legalize the drug. Politicians, constituents, and activists used the right to choose to argue that patients, particularly those with incurable diseases, should have the freedom to try anything that would not harm them.

In the mid-1970s, with the *Rutherford* and *Privitera* suits pending, the Cancer Control Society, the Committee for Freedom of Choice in Cancer Therapy, and other groups distributed how-to guides to members and supporters interested in bringing a constitutional lawsuit, but the Laetrile movement put arguments involving the right to choose to far broader use. State affiliates of the Committee and CCS took arguments about privacy on tour, holding events at malls, parking lots, and amusement parks and doing talk shows, signature drives, and protest rallies.[69]

After 1976, with local groups operating across the country, many states considered legalizing some uses of Laetrile. Activists hoped to make progress because the right to choose seemingly appealed to politicians with clashing views on abortion. In Congress, Representative Larry McDonald (D-GA),

consistently ranked as that body's most conservative member, sponsored a bill legalizing Laetrile. McDonald's bill won the support of prominent liberals, including Representatives Charlie Rangel (D-NY) and Shirley Chisholm (D-NY). In May, Indiana passed a Laetrile bill sponsored by a leading Republican legislator over the veto of a governor belonging to the same party. In Nevada and Arizona, Democratic governors Mike O'Callaghan and Raul Castro signed similar bills into law, mentioning the right to choose as the source of patients' right to make medical decisions without government interference. O'Callaghan emphasized that, under the Constitution, "a person [had] the right to attempt to live with the least amount of pain and depression." Democratic governors Dixy Lee Ray of Washington and Edwin Edwards of Louisiana saw the issue of choice as the same in either context. In explaining his decision to sign a Laetrile bill into law, Edwards echoed the reasoning of *Roe:* "patients should have the right, in consultation with their doctors, to decide for themselves."[70]

Embrace of medical consumerism cut across ideological lines partly because the health-care delivery system itself had changed fundamentally. In the mid-1970s, patients sometimes struggled to find quality primary-care physicians because so many doctors preferred to go into growing specialty areas. In 1978, the *New York Times* reported that 60 percent of new doctors went into a specialty, 40 percent more than would have been necessary to meet patient need. The primary-care shortage came at a time when medical costs had reached unprecedented heights. In 1978, national medical expenditures totaled nearly $200 billion, a threefold increase since the start of the decade. Patient need sparked the growth of allied medical services, including nurse practitioners, medical technicians, physician assistants, and nurse midwives. Over the course of the decade, these so-called physician extenders became a core part of the medical system. In 1978, when Congress authorized reimbursement under Medicare and Medicaid for services provided by physician extenders, published studies found that those in the allied professions provided 75 percent of the care patients received.[71]

At a time when it was harder to establish personal relationships with primary-care doctors, patients took a new interest in self-help and self-care, inspiring the publication of a variety of books, including *How to Choose and Use Your Doctor* (1975), *How to Talk Back to Your Doctor* (1975), and *How to Be Your Own Doctor (Sometimes)* (1975). Patients formed over 1,200 self-help med-

ical groups by 1975, and feminists promoted women's health centers that offered what many saw as less patronizing, more patient-centered care. With patients questioning physicians' motives, expertise, and values, medical consumerism flourished.[72]

Those using arguments about freedom of choice benefitted from new patient skepticism about the care they received. Gloria Swanson, a Hollywood star and staunch conservative, connected her support for Laetrile to both self-help and consumerism. "I may have no education, but I do have common sense," she wrote in the Committee's magazine, *Choice*. "All we want is to be free to take care of ourselves, and they won't let us." Given the sense of hopelessness surrounding cancer, patients used the right to choose in explaining that they could certainly do no worse than the doctors who failed to cure them. As one voter asked: "If nothing that medical science offers works, then why can [patients] not have one more chance to save themselves through Laetrile?"[73]

While exploiting interest in medical consumerism, the Laetrile movement also borrowed from the revivals, radio programming, and televangelism tied to the emerging Religious Right. In the 1970s, when mainline Protestant denominations were in decline, evangelical Protestant churches experienced rapid growth. Before mid-decade, the nation's ten largest churches were all evangelical. With the growth of evangelical Protestantism, religious broadcasting flourished. Prominent televangelists like Jerry Falwell broadcast on over 300 stations. Laetrile activists drew on these media strategies, hosting meetings where attendees sang religious songs and shared stories about miraculous recoveries.[74]

Although some of the support for Laetrile stemmed from changes to American religion and medicine, the right to privacy stood at the center of political debate about the drug. The Laetrile debates that unfolded in Illinois and Wisconsin illustrate how much legislators legalizing the drug relied on the right to choose. In Wisconsin, the leader of the legalization effort, Republican state representative Richard Matty, had worked as a coroner before joining the state legislature. He became deeply invested in legalizing Laetrile, sponsoring a bill that classified it as a food and permitted physicians to prescribe it. Matty toured fraternal organizations across the state to champion his cause. His experiences reveal the sometimes-conflicting ideas of patients' rights that fueled the Laetrile movement.[75]

Early on, Matty's constituents echoed arguments made by the Committee about the dangers of unchecked federal power. Conservative voters were particularly vocal about what they saw as tyrannical administrative agencies. One stated: "[I]t jars our complacency when we realize the full potential for oppression when an . . . agency has unlimited power over people. . . . And they cannot be voted out of office." Some voters equated support for Laetrile with hostility to liberal politics writ large. Others assumed that Matty would follow the Laetrile bill with other legal proposals favored by the New Right, such as an attempt to rescind Wisconsin's ratification of the Equal Rights Amendment.[76]

Once the state legislature began debating the legalization of Laetrile, support for a right to choose Laetrile reached beyond conservative circles. *Roe* (or reinterpretations of it) emphasized the relationship between privacy and choice for patients. Supporters of Laetrile similarly believed that *Roe*'s right to privacy extended to other divisive medical issues. Emphasizing a right to choose won over voters who were unconvinced that Laetrile cured cancer. "I don't know if Laetrile has any medicinal value (who does?)," one supportive voter wrote. "[T]he point is, if we want it and it has no side effects, we should have it." Another voter echoed this idea: "The question here is not whether the individual is getting proper care, but that rights have been taken away."[77]

By focusing on a right to choose, politicians could also endorse Laetrile legalization without taking a stand on the drug's efficacy. In *Roe*, the Court presented constitutional discourse as a neutral alternative to heated moral or political disagreements about abortion. Without taking sides on the efficacy of Laetrile, Matty and his supporters similarly invoked the right to choose in making their case for legalization. Matty himself pushed this argument when questioned about scientists' doubts about Laetrile. "[T]he issue here is not whether Laetrile can control cancer," he wrote to one voter. "[M]y position on the issue is to give people freedom of choice."[78]

These arguments about the right to choose attracted the support of a diverse group of constituents, including those with clashing views on abortion. In writing Matty to explain his support for the bill, an avowed opponent of the women's movement relied on the analogy between the rights to choose abortion and Laetrile: "Big Government condones the killing of unborn babies via abortion, so I think it is only fair to legalize a known, proven, tried method to save life." A voter supportive of reproductive rights relied

on the same analogy: "In this country, church and state are separate. Where our church does not approve abortion, they do feel we have the right [to choose it]. . . . [With respect to Laetrile,] I beg you, please give us the right to decide for ourselves."[79]

Voters also described a right to privacy reminiscent of the one in *Roe,* a right connected to the physician-patient relationship. One constituent explained: "Every citizen in the State of Wisconsin is entitled to seek the medical treatment of his choice and every doctor is entitled to give the patient the usually agreed upon treatment."[80]

The Wisconsin debate centered so much on the scope of a right to choose that even opponents of the law described their views in these terms. One constituent argued that Laetrile had nothing to do with the rights recognized in the 1973 decision: "Freedom . . . to choose Laetrile may leave the patient with little choice if they delay seeking prompt diagnosis and proven treatments which are indeed effective."[81]

Partly because of Matty's efforts, Wisconsin became one of more than twenty-five states to legalize some uses of Laetrile. So did Illinois, a state bitterly divided about both Laetrile and abortion. In April, after the House Human Resources Committee approved a bill allowing Illinois physicians to prescribe Laetrile to their own patients, choice arguments took center stage. Opponents of the bill, including Robert S. Young of the FDA, primarily emphasized the complete lack of evidence that Laetrile helped cancer patients.[82]

However, with dialogue so focused on the right to choose, even medical leaders had to describe and defend rights for patients. While reiterating that "Laetrile [was] of no objective benefit whatsoever in the treatment of cancer patients," James Mason of the American Cancer Society argued that Laetrile legalization would violate patients' rights. As he wrote: "The real freedom of cancer patients to expect the best possible treatment and care is severely abridged when the constraints of sound medical judgment and accountability are erased by the provisions in the law." Representative Joseph Ebbesen, an optometrist and staunch conservative, also used choice rhetoric to oppose the bill. "Neither the House nor the Senate of the State of Illinois belong[s] practicing medicine and prescribing treatment," he reasoned. If *Roe* recognized the privacy of the physician-patient relationship, then Laetrile legalization laws meddled with that relationship and thereby undermined what the Court had set into motion in 1973.[83]

Champions of the legalization bill, including the leader of a chapter of the Committee formed only months earlier, responded that *Roe*'s right to choose required legalization of alternative cancer treatments. Women who urged Ebbesen to change his mind—including those with opposing views on legal abortion—compared the right to terminate a pregnancy to the decision to choose Laetrile. One voter saw the issue of the right to choose as one and the same in the context of abortion and Laetrile: "The urgent need is to guarantee freedom of choice to both the physician and patient . . . and to prevent outside interference or harassment in their decision." "Our government has given us the right to have an abortion if the person decides it is in their own best interest," another voter wrote. "But yet we are denied the . . . right to try and survive the best we see fit, with the use of Laetrile. The cancer victim has no choice."[84]

Convinced by this vision of the right to choose, both houses of the Illinois legislature passed the legalization bill by overwhelming margins, at the same time introducing bans on the public funding of abortion. In August, after Republican governor James R. Thompson vetoed both bills, Laetrile champions won enough votes to override the veto. Members of the Committee and the IACVF described their victory as a vindication of both the right to life and the right to choose debated in the abortion wars. While Joe Kosarek of the IACVF insisted that his "sole interest" was giving the "people of Illinois the right to life," Phil Dowd of the Committee reminded the press that he belonged to a freedom-of-choice movement. "The legalization of Laetrile is secondary," he stated. "What is more important is the freedom of choice."[85]

At the end of 1977, when litigation resumed, the promise of a right to choose linking abortion and Laetrile seemed real, but by the end of the decade, the movement had lost ground. Whereas some state judges recognized a right that protected a variety of alternative practitioners, the federal courts decisively rejected the idea of a right to choose ineffective medical treatments. Together with setbacks in the courts, the limits of Laetrile legislation exposed some of the shortcomings of the privacy claims on which alternative practitioners relied.

Failure in the Courts

George Kell, the leading lawyer in the Laetrile movement, celebrated his first win in a California appellate court when Dr. Privitera successfully challenged the constitutionality of a provision in the state health and safety code that made it a misdemeanor to sell, prescribe, or administer a drug that was not approved by the FDA or state medical authorities. While Privitera lost on appeal before the California Supreme Court, the movement's constitutional arguments initially paid dividends in *Rutherford*. Ruling that Laetrile was not a new drug, District Judge Luther Bohanon also held that the FDA ban violated the Constitution. Reasoning that *Roe* and *Doe* recognized that "[t]he right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic," the court held that the Constitution protected patients' choice to use Laetrile.[86]

The following July, the Tenth Circuit affirmed the district court's decision in *Rutherford* without reaching the constitutional questions raised by Laetrile proponents. Instead, the court focused on the definition of a new drug under the Food and Drug Act. Ultimately, the Tenth Circuit concluded that the safe-and-effective standard could not rationally apply to patients suffering from incurable cancer. "[W]hat can 'generally recognized' as 'safe' and 'effective' mean," the court asked, "as to such persons who are so fatally stricken with a disease for which there is no known cure?"[87]

Notwithstanding the limited scope of the Tenth Circuit decision, members of groups like CCS interpreted the decision as recognizing a right to use Laetrile. Other alternative practitioners tried to use *Roe* to similar ends. When state medical boards disciplined doctors for practicing acupuncture, physicians responded by citing *Roe*. A Delaware chancery court read *Roe* to protect an optometrist acting under a doctor's supervision to produce contact lenses, reasoning that "[t]he Supreme Court . . . has clearly indicated that it must be left to the physician and his patient to decide on a course of medical treatment." A federal district court in Houston interpreted *Roe* as the source of a patient's right to seek out acupuncture. These alternative practitioners presented medical treatments as just one more consumer good shaped, selected, and controlled by those paying the bills. Celebrating the progress of "the freedom of choice movement," Committee members and other

movement members reiterated that "the right to privacy includes the right to freedom of choice in therapy."[88]

In the spring of 1979, medical groups and members of the Laetrile movement filed briefs in the Supreme Court in *Rutherford*, again fighting about the meaning of *Roe*. The United States insisted that the 1973 decision in no way recognized a right to use Laetrile, even if the drug was harmless. The United States asserted that, to the extent that *Roe* involved any freedom of choice for patients, they could select only safe and effective treatments. The Court had struck down abortion regulations "not because they interfered in health care decisions, but because they demonstrably were not designed to serve any health interest."[89]

Amici from the medical establishment, including attorneys representing the American Cancer Society (ACS), also insisted that *Roe* offered no help to patients who preferred alternative treatments. ACS lawyers argued that under *Roe* patients had at most a right to choose to receive treatment rather than letting the disease run its course. "The analogue of the right to decide whether to have an abortion is the right to decide whether to receive or forgo cancer treatment," the ACS explained. "But although the decision whether to receive treatment may be constitutionally protected, the choice among treatment alternatives is not within the scope of the constitutional right to privacy."[90]

Finally, even if the Court did apply the right to choose in the case, the ACS maintained that under *Roe* the government's interest in protecting the public health still justified the FDA regulation. "The authority to protect individual health, and the public health generally, may be exercised to overrule the woman's personal decision to undergo a particular medical or surgical procedure during the second and third trimesters of pregnancy even when she is fully aware of the risks of the procedure, and is willing to take those risks," the ACS argued. "An individual's decision to use Laetrile can stand on no higher constitutional level than the decision of a woman to have an abortion in the later stages of pregnancy."[91]

For the ACS and the FDA, *Roe* recognized a quite narrow right—the right to seek treatment, not to decide which kind. Both briefs insisted that the Court had done nothing to deregulate medicine or to assign authority to individual patients. Instead, any right to choose remained circumscribed by medical expertise, consumer-protection regulations, and the state's interest in public health.

Joined by CCS, the NHF, the Committee, and other allied organizations, the *Rutherford* respondents reinforced arguments about the right to choose developed in state legislative debates. Citing *Roe* and *Doe*, CCS explained: "By acknowledging the right to undergo an unauthorized medical procedure, these cases went beyond the mere recognition of the patient's right to decline treatment." CCS asserted that, in recognizing a right for patients to choose a criminalized medical procedure, the *Roe* Court had restricted the government's authority to regulate any treatment decision. For terminally ill patients, treatment decisions were just as intimate and important as those involving abortion.[92]

The American Academy of Preventics, an allied group, similarly contended that *Roe* "dealt specifically with the right to determine one's own medical treatment." In this analysis, *Roe* and *Doe* recognized patients' right to make informed choices about their health. If Laetrile was unproven, this made no difference to the constitutional analysis. As the Academy reasoned: "It is the right to make the decision—the right to weigh the possible benefits, the risks and the expense of a program of nutritional therapy in light of intimate personal feelings and objectives—which is protected by constitutional guarantees of privacy and personal liberty."[93]

In June 1979, when the Supreme Court issued a decision in *Rutherford,* Laetrile proponents expressed disappointment, but the constitutional fate of the drug still seemed open to question. In a unanimous opinion by one of the Court's most liberal justices, Thurgood Marshall, the Court sided with the FDA without addressing the constitutional issues raised in the case. First, the Court took up an issue highlighted by the Tenth Circuit—the fact that the patients challenging the FDA ban were terminally ill and theoretically had nothing to lose from experimenting with questionable therapies. Marshall concluded that nothing in the text of the Food, Drug, and Cosmetic Act supported a distinction between terminally ill patients and any others. Nor did the history of the statute convince the court. If anything, as Marshall explained, supporters of the 1962 amendments to the statute explicitly discussed the protection of those suffering from incurable cancer. Moreover, as the majority noted, the FDA—an agency to which the Court paid some deference—had consistently interpreted the statute to include terminal patients.[94]

In closing, *Rutherford* addressed the Tenth Circuit's interpretation of the law. That court had reasoned that the "safe and effective" provision of

the act could not rationally apply to patients with an incurable disease. Marshall emphasized that the courts had limited power to ignore the plain language of the statute in any case. For the *Rutherford* majority, there was nothing absurd about requiring treatments for the terminally ill to be safe and effective. An effective drug would fulfill "by objective indices, its sponsor's claims of prolonged life, improved physical condition, or reduced pain." A drug would be unsafe for the terminally ill "if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit." *Rutherford* picked up on an argument popularized by the American Cancer Society, reasoning that the government had a greater stake in ensuring that terminally ill patients receive only safe and effective drugs. Given the seriousness of a terminal diagnosis, patients without any hope might make irreversible decisions if the government did not protect them.[95]

While deciding the case as a matter of statutory interpretation, the Court recognized that the Laetrile wars represented a broader challenge to the role of the state in regulating medical care. "To accept the proposition that the safety and efficacy standards of the Act have no relevance for terminal patients," Marshall explained, "is to deny the Commissioner's authority over all drugs." Even if the Court did not explicitly mention the abortion decision by name, the justices made clear that *Roe* did not demand so far-reaching a change.[96]

For almost a year after the *Rutherford* decision, the prospects for the Laetrile movement still seemed bright. The Committee insisted that the Court's decision had done nothing to resolve the core constitutional questions at stake in the Laetrile conflict. The same year, the National Cancer Institute (NCI) bowed to political pressure and agreed to conduct clinical trials on Laetrile.[97]

Nevertheless, by 1982, the Laetrile movement was in disarray. In *Rutherford*, the Supreme Court had remanded the case to the lower courts to decide the remaining questions, including those about the constitutionality of the ban. In February, the Tenth Circuit easily rejected the remaining challenges raised by the *Rutherford* class. As to the constitutional issues presented in the case, the court concluded that patients had no right to direct the course of therapy. *Roe* had made clear that the "selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health."[98]

The Tenth Circuit's decision dealt a devastating blow to an already-struggling movement. The Committee admitted that the opinion had

"K.O.['d] Laetrile." Nor did the NCI trials offer any good news. Published in the *New England Journal of Medicine*, the second clinical trial found no improvement in patients' life expectancy, symptoms, or condition. Politicians and voters finally seemed to share the skepticism of medical professionals. In the later 1970s, the push for Laetrile legalization seemed unstoppable, but less than a decade later, the movement seemed to be little more than a curious political footnote.[99]

It was easy to forget why champions of legal Laetrile had framed their cause as a vindication of the right to privacy. The press often identified Laetrile supporters with far-right groups like the John Birch Society, and conservatives did endorse legalization of the drug. But by describing themselves as champions of the right to choose, movement leaders sought to reach a much larger group of recruits. Politicians and voters with different opinions about abortion and the role of government found arguments about patient autonomy attractive. In spite of the partisan origins of the movement, the idea of patients' right to choose seemed to capture the attention of leaders and voters tied to both political parties.

Just the same, movement leaders wondered if privacy arguments had ever worked as well as Laetrile champions might have hoped. In the legal academy, criticisms of *Roe*, *Griswold*, and the Supreme Court's other substantive due process decisions had already undercut the justices' interest in extending privacy rights. Given the controversy surrounding the possible profit motives of Laetrile peddlers, many federal judges refused to expose themselves to more criticism.

In the political arena, where choice arguments seemed more influential, privacy claims left open troubling questions about whether Laetrile was a hoax. Focusing on a right to choose Laetrile made sense when voters questioned whether the drug worked. But for this reason, many who were theoretically supportive of a right to access the drug did not question the stigma surrounding Laetrile and those who sold it. Even if the drug was technically legal, the movement inevitably struggled when it could not convince the public that Laetrile benefited cancer patients.

Moreover, litigants and lobbyists relying on privacy arguments often had trouble even when authorities and voters accepted that patients had a right to choose Laetrile. By its very terms, a privacy right tied to *Roe* did not provide absolute protections. If anything, as the Supreme Court gradually moved

away from protecting abortion rights, the states seemed to have more room to regulate when the right to privacy was at stake. And even if *Roe* did provide meaningful protection, the state could still limit patients' decisions if it had a significantly compelling reason to do so. In the face of lingering questions about the toxicity and efficacy of Laetrile, the medical establishment scored victories by pointing to government interests in protecting public health.

By 1980, *Roe* had little allure for conservatives interested in patient privacy. Over the course of the 1970s, as battles about abortion funding heated up, supporters of a woman's right to choose increasingly made privacy indistinguishable from legal abortion. At the same time, both political parties solidified their positions on reproductive issues, marginalizing pro-choice Republicans. By the decade's end, conservative support for the right to privacy often seemed to be a contradiction in terms.

The Abortion Conflict

After 1980, those interested in either information privacy or alternative medicine could no longer expect bipartisan support in Congress. As both *Roe* and the right to privacy became more exclusively associated with abortion, an earlier consensus on patient privacy faded away. Beginning in 1976, when Congress first banned reimbursement for abortion under the federal Medicaid program, legislators found themselves in a heated annual debate about exceptions to the funding ban. Those defending the rights of poor women took up the banner of privacy, a term increasingly used as shorthand for abortion. At the 1977 convention for the National Organization for Women, those present gave a standing ovation to a speaker who maintained that abortion was "a privacy issue." Aryeh Neier of the ACLU attacked congressional Medicaid restrictions as measures that "interfere[d] with the right to privacy." As the public came to identify both privacy and *Roe* with abortion, the issue determined politicians' willingness to defend any privacy for patients, including rights totally disconnected from the termination of pregnancy.[100]

Furthermore, in the late 1970s, leading activists on each side of the issue more consistently described *Roe* as a decision about a woman's right to choose. Particularly when talking to one another, some feminists regularly described *Roe* as a decision involving women's right to choose. But earlier in the 1970s,

other supporters of abortion rights had played down some arguments involving a woman's right to choose, viewing these claims as unnecessarily provocative. Pro-lifers also often emphasized the connection between *Roe* and rights for physicians. In part, abortion opponents did so because they found the *Roe* Court's reliance on medical reasoning particularly offensive. Believing that medical evidence conclusively established the personhood of the fetus, pro-lifers viewed the *Roe* Court's setting out of rights for physicians and patients as its most shocking weakness. Moreover, pro-lifers used such an interpretation in arguing that the opposition neither cared about nor helped women. Women were "delud[ed] to feel that the Supreme Court decision [in *Roe*] was in their favor," explained pro-life leader Mildred Jefferson. "The final decision [was] the doctor's."[101]

But later in the 1970s, activists on both sides more often tied *Roe* to a woman's right to choose. As feminists took over major abortion-rights organizations like NARAL and Planned Parenthood, the new leadership contended that *Roe* had empowered women, thereby refuting opposition claims that the Court had left the final decision in the doctor's hands. Pro-life groups building a relationship with the New Right and Religious Right happily tied *Roe* to the women's movement in condemning both. Those on both sides increasingly agreed with the National Right to Life Committee that in *Roe* "the Court . . . extend[ed] a woman's right to decide whether or not she desires an abortion."[102]

As *Roe* became more closely associated with the women's movement, it became less appealing as a symbol to both conservatives and those interested in changing the delivery of health care. If more understood *Roe* as a symbol of women's liberation, the decision seemed unrelated to debates about medical treatments or sensitive information. Conservatives alienated by the broader agenda of the women's movement also found it hard to stomach any mention of a decision identified with feminism.[103]

Moreover, in the late 1970s, political-party realignment on the abortion issue muted Republican support for patients' information privacy and choice in medical treatment, particularly when connected to the *Roe* decision. For much of the 1970s, positions on abortion did not break down neatly along party lines. Leading antiabortion politicians, including Senator Thomas Eagleton (D-MO) and Representative Richard Gephardt (D-MO), held prominent places in the Democratic Party. While the antiabortion movement

boasted the support of Republican stalwarts like Senator Jesse Helms (R-NC) and Representative Henry Hyde (R-IL), other prominent party members, including Senators Jacob Javits (R-NY) and Edward Brooke (R-MA), fought for abortion rights.[104]

However, by 1980, when Ronald Reagan emerged victorious from the Republican primary season, the GOP officially became what abortion opponents called the party of life. Reagan had been openly hostile to legal abortion since the 1976 primary season, and he ran on a platform that endorsed a fetal-protection amendment to the Constitution and bans on Medicaid funding of abortion. By contrast, the Democratic platform discussed privacy only in the context of abortion, declaring: "The Democratic Party recognizes reproductive freedom as a fundamental human right."[105]

The parties' platforms reflected increasing polarization on major issues. Starting in the mid-1970s, both major political parties became more ideologically coherent. As the gap between the parties widened, the Republicans who served in Congress generally became less sympathetic to the women's movement. In 1974, the GOP had lost thirty-five seats in the House and a handful in the Senate. Although there were no dramatic setbacks in 1976, the Republicans still seemed destined to be a permanent minority. But for the pro-life movement, the more than thirty Republicans who joined Congress seemed to be promising allies. New members of Congress, like Representative Newt Gingrich (R-GA) and Senator Orrin Hatch (R-UT), were more conservative than the moderate and liberal Republicans who had fared better in 1974. The new Republicans opposed increases in government spending and more often expressed hostility to the women's movement. As politicians gradually associated privacy and *Roe* exclusively with abortion, any bipartisan push for patients' information rights or choice in medical treatment seemed politically unimaginable.[106]

Roe in the Fight over the Future of Health Care

In the 1970s, the federal government retreated from its traditional role in overseeing the energy, transportation, communications, and banking sectors of the economy. Activists, health care providers, and lawyers used the right to privacy to push for the deregulation of areas of American life where the federal presence was still significant, particularly in the context of health care.

By studying those who sometimes used *Roe* to frame their vision of privacy, we can see how a diverse group of civil libertarians, far-right conservatives, politicians, and alternative health care providers reimagined the physician-patient relationship. In the shadow of the Watergate scandal, some activists pointed to *Roe* in identifying a right for patients to gain access to and control sensitive medical information. Champions of alternative cancer remedies also called for the empowerment of patients.

Even though abortion had been a divisive issue for more than a decade, activists saw value in using *Roe*. For champions of medical consumerism, *Roe* described a right to choose even the most controversial medical treatments and undercut the legitimacy of any government regulation of health care. Civil libertarians wanted to leverage the connections they saw between autonomy and equal treatment in *Roe*, seeking to define a similar relationship between patients' control of medical information and their interest in avoiding discrimination. Some of these activists pointed directly to *Roe*, while others simply invoked a right to choose tied to the decision.

Those seeking to transform medical care in America defined constitutional privacy in unconventional ways. Alternative practitioners, free-market conservatives, and proponents of medical consumerism insisted that the logic of consumer control, free markets, and government nonintervention that informed most industries should guide the delivery of health care. Activists across the political spectrum also proposed a new balance of power in American medicine, insisting that patients had far too little control over their own treatment and personal information. Some also recognized that power in the doctor-patient relationship inevitably overlapped with questions of equal treatment under the law. While regulations meant that poor Americans did not have the same access to remedies that wealthier patients could still find for the right price, leaked medical information facilitated discrimination on the basis of race, sex, disability, political beliefs, class, and medical condition.

Nonetheless, when drawing attention to a right to choose, activists and voters sometimes left untouched hard questions about the safety, legitimacy, and value of the changes a movement promoted. Government authorities and other defenders of the status quo could easily fend off proposed legal and social changes by identifying an adequately compelling state interest.

By the early 1980s, the calculus for using privacy arguments had changed. As abortion became a crucial issue in presidential politics, conservative

activists and politicians let go of arguments involving the *Roe* decision. Instead, right-leaning activists often presented privacy rights as shorthand for the agenda of the political Left. Social movements would continue to use the *Roe* decision in surprising and transformative ways, but did so primarily when seeking the support of movements aligned with the Democratic Party.

However, for much of the previous decade, activists and providers across the political spectrum drew on the decision to articulate a vision of medical care that was more consumer-oriented, experimental, and market-driven. If under *Roe* women had a right to abortion because pregnancy affected them the most, many Americans believed that the Constitution should give all patients the same degree of control. Who, after all, was more deeply affected by a treatment than the patient herself?

5

Death, Discrimination, and Equality

Ilene Kaplan felt that she had been born to help the dying, but it took her some time to find her calling. She pursued a career as a social worker in Connecticut, and her husband worked as an engineer. One of his colleagues, Roswell Gilbert, grew close to the couple. Gilbert and his wife, Emily, had been lucky in life. They had no financial worries, enjoyed travel abroad, and owned a beautiful home in Florida. Later, in his seventies, Gilbert continued visiting the Kaplans, but he came alone and departed quickly. He explained that he could no longer leave his wife alone.[1]

When Kaplan visited the Gilberts, she was struck by Emily's condition. Suffering from Alzheimer's, Emily no longer knew her children's names. She could not put on her own makeup. Kaplan recalls that Emily wanted to die and often said so. Sometime later, Kaplan learned that Roswell had shot and killed his wife. To her shock, prosecutors brought homicide charges against him. A jury later convicted Gilbert of murder and sentenced him to twenty-five years in prison. At that point, Kaplan felt she "had to do something" and founded a chapter of the Hemlock Society in Connecticut. In her work in the state and on the national board of Hemlock, Kaplan turned to arguments

drawn from rights to privacy and *Roe*. "The whole issue," she said, "was choice."[2]

In Georgia, Larry McAfee's trip to court put on display a very different definition of choice. McAfee, a mechanical engineer, became a quadriplegic following a serious motorcycle accident. Once his private health insurance ran out, he had to depend on Medicaid to cover the cost of his ventilator and other care. McAfee wanted to live at home with his parents in rural Georgia, but the state would not cover his expenses there, only the cost of a nursing home. Worse, no nursing home would accept him, and he ended up spending more than six months in an intensive care unit. Hopeless, McAfee filed a court order seeking permission to turn off his ventilator and protect anyone who assisted him from criminal charges. McAfee's lawyer and those supporting his case presented him as a man unwilling to surrender his right to choose at the end of life. Dr. John Banja, a professor at Emory University who testified in favor of McAfee's right to die, emphasized that the man wanted to exercise his "right to autonomy, self-determination and liberty."[3]

Horrified by McAfee's circumstances, disability-rights activists in Georgia and across the country argued that his case had nothing to do with real autonomy or self-determination. Paul Longmore, a history professor in California and disability-rights activist, saw parallels between his life and McAfee's. Having suffered from polio, Longmore had a curved spine and paralyzed arms, and he used a ventilator for as many as eighteen hours a day. He burst onto the disability-rights scene in 1988 when he burned a copy of his first book to protest a proposed shift in state policy that would discourage disabled people from working. Yet all things considered, after hearing about McAfee's case, Longmore decided that he had been lucky. Longmore lived in a state that covered some of the costs of living independently, and he had built a satisfying career, becoming a tenured professor at San Francisco State University. If only a few things had been different, he could have been Larry McAfee. "This is the sort of 'autonomy, self-determination and liberty' society willingly accords people with disabilities: the freedom to choose death," Longmore wrote of McAfee's case. "And then it applauds our 'courage' and 'rationality,' all the while ignoring how society itself has battered us and made our lives unbearable."[4]

In Georgia, disability-rights activists attacked the *McAfee* Court for "sanction[ing] [a] value judgment on the lives of disabled people."[5] These ad-

vocates were diverse, but many considered themselves liberal and favored legal abortion in most cases (if not when women terminated a pregnancy because of disability). But as Longmore argued, McAfee's case seemed to have more to do with discrimination than with personal privacy. Atlanta-based leaders connected McAfee's decision to the lack of resources available for disabled persons who wanted to live independently. As they explained: "Through indifference and stinginess, the state creates an unbearable quality of life and then steps in and says that disabled people should be assisted to die because their quality of life is so poor." Although McAfee convinced a court that he had a right to die, disability-rights activists helped him move from a hospital intensive care unit to a community setting, and McAfee changed his mind. For many in the disability-rights movement, he became a symbol of how the right to choose death was nothing more than an excuse for discrimination.[6]

From the mid-1980s until the late 1990s, activists like Longmore and Kaplan made a variety of privacy arguments in contesting the rights and responsibilities defining end-of-life care. Starting with how these advocates fit *Roe* into their plan of attack, we can see how right-to-die advocates reinvented privacy. In the 1930s, groups formed to lobby for the legalization of euthanasia. While the cause did not catch on for some time, the movement renewed its push in the 1960s. Comparing their cause to the legalization of abortion, activists defined themselves as champions of human autonomy. For the most part, however, fights about the right to die remained in the shadow of the law, and the movement primarily laid the groundwork for greater cultural acceptance of living wills.[7]

By contrast, by the end of the 1980s, battles about end-of-life care had reached a fever pitch. An increase in the number of mercy killings—eighteen of thirty-six cases reported in the first five years of the decade took place in 1985 alone—threw off the legal balance that applied to end-of-life cases. Cases like the prosecution of Roswell Gilbert also put an end to the complacency of those convinced legal change was unnecessary. At the same time, a series of state court decisions carved out a privacy right covering even those who were not terminally ill.[8]

With the Supreme Court poised to take on the issue, a divided movement championed several very different ideas about the right to die. While groups like the Society for the Right to Die (SRD) and Concern for Dying (CFD)

focused on the decision to refuse unwanted medical care, the Hemlock Society called for the legalization of assisted suicide. Both factions legitimized their claims by drawing on the right to choose. At times, activists explicitly mentioned *Roe*. Often, they instead drew on popular understandings of the decision, pointing to a right to choose, a right to control one's body, or the fight for legal abortion.

These advocates used the idea of constitutional privacy in unconventional ways. *Roe* (or at least popular interpretations of it) involved a woman's interest in both autonomy and bodily integrity. Refusing unwanted medical treatment could touch on the same concerns. But the movement described a constitutional right that went further, covering an individual's interest in controlling her identity and sense of self. The idea of privacy developed by the movement also involved freedom from private citizens as well as from the government. Organizations like SRD and CFD defined a constitutional autonomy interest in avoiding dependence on anyone else, including medical professionals and family members. These activists leveraged the sometimes-blurry relationship between choice and privacy to seek different forms of autonomy for Americans at the end of life.[9]

This strategy had obvious appeal. In the state courts, right-to-die advocates made headway, establishing that the right to privacy extended to end-of-life decisions. In the political arena, the movement used related choice arguments to strengthen political alliances with civil libertarians and feminists committed to constitutional privacy and abortion rights.[10]

As the right-to-die movement advanced, pro-lifers and disability-rights activists mobilized, although the relationship between the two movements was often fraught. Opposition groups developed their own unfamiliar understandings of constitutional privacy. Pro-lifers argued that the issues of euthanasia and abortion were indistinguishable. The idea of choice simply veiled the devaluation of vulnerable and dependent individuals, including the unborn. Often uncomfortable aligning with pro-lifers, disability-rights activists insisted that demands for a right to choose ignored the discrimination and lack of state support that drove many who sought to die.[11]

In 1990, the Supreme Court's decision in *Cruzan by Cruzan v. Director, Missouri Department of Health* seemed to stabilize the battle, endorsing a narrow right to refuse unwanted medical treatment. However, any settlement of the issue proved short-lived. Soon after the *Cruzan* decision, a jury in a high-

profile assisted-suicide case acquitted a doctor of murder charges. After the publication of studies showing that physicians did not consistently honor living wills, the legalization of assisted suicide seemed to some to be more necessary and urgent.[12]

In 1997, in *Washington v. Glucksberg* and *Vacco v. Quill*, the Supreme Court refused to recognize a right to die, sending the fight back to state legislatures. Supporters of a right to die had hoped to mainstream their cause, win legislative supporters, and align with civil libertarians and feminists. However, it seemed that choice arguments had not resolved longstanding concerns about vulnerability at the end of life. While seeking to build potent coalitions and convince the courts, the movement brought to the surface a deep divide about when a right to die advanced, rather than undermined, Americans' interest in equal treatment.[13]

Reinventing a "Right to Die"

The movement for a right to die had roots reaching back to the early twentieth century. Euthanasia, defined by its supporters as a "good death," appealed to a generation of reformers committed to creating what they saw as a more scientific legal order. As the nation grappled with urbanization, industrialization, and mass immigration, these Americans sympathized with a Progressive movement that rejected old value systems. Progressives saw some forms of mercy killing as the kind of rational solution that lawmakers should back. Just the same, few believed that it would be possible to change the law any time soon. Staunch opposition from the medical profession, together with a lack of popular support, made the idea seem out of step with the times. Believing progress to be impossible, eugenicist legal reformers pushed aside euthanasia proposals and promoted other laws designed to weed out unfit citizens, including compulsory sterilization.[14]

Interest in voluntary euthanasia spiked in the 1930s. A series of blockbuster mercy-killing trials gripped the nation, and the suicides of high-profile figures, including feminist Charlotte Perkins Gilman, kept the issue on the front pages. The Great Depression also created an opening for euthanasia supporters. Sensitive to the costs of heroic medical procedures and distressed by steep unemployment, a broader group of Americans seemed receptive to the idea of euthanasia. As suicide became less stigmatized, earlier

supporters of euthanasia regrouped. By 1938, a group of elite doctors, bureaucrats, and physicians had formed the National Association for the Legalization of Euthanasia, later the Euthanasia Society of America (ESA), a group committed to allowing "incurable sufferers to choose immediate death rather than await it in agony."[15]

ESA brought together veterans for the campaigns for women's suffrage, birth control, and eugenics. With women already exercising the right to vote, ESA members believed that the legalization of both birth control and euthanasia would soon follow. The group had reason for optimism: a poll taken in the late 1930s found that almost 50 percent of respondents favored legalizing mercy killings.[16]

By the 1940s, the movement had lost ground. Catholics and Fundamentalist Protestants condemned euthanasia. The Catholic Daughters of America passed a resolution condemning euthanasia as "irreligious, unscientific, and criminal." In December 1940, the Vatican attacked mercy killing as a violation of natural law. On the defensive, supporters of a right to die struggled to distinguish themselves from Nazis who championed mercy killing for minorities and the disabled. For much of the twentieth century, ESA stood alone in endorsing euthanasia.[17]

After 1965, a series of cultural shifts revived what would be called the right-to-die movement. After World War II, life expectancy rose, exposing more patients to life-support technologies, including respirators, feeding tubes, and kidney dialysis. As more patients experienced painful and expensive end-of-life care, some questioned the widespread use of the new technologies. At the same time, the rise of physician extenders and the decline in the number of primary-care physicians made medical care seem more anonymous and bureaucratic. By the 1970s, these changes reinforced public disenchantment with the medical profession: polls measuring public admiration of physicians documented a drop in approval from 72 to 57 percent between 1965 and 1973 alone.[18]

While the movement had long framed euthanasia as a government-directed tool for social improvement, reformers later seized on a vision of individual rights tied to racial equality and women's liberation. Leading euthanasia organizations also reinvented themselves. This process began before the *Roe* decision, when ESA borrowed from the arguments of the abortion-rights movement. As early as 1966, Donald McKinney of ESA wrote

a letter to the editor of the *New York Times* describing the right to die as a "human right," involving "the choice between prolonged suffering . . . or a peaceful and dignified death." ESA leaders compared abortion and the right to die. As one ESA member explained, in both contexts: "Men and women are demanding the right to determine their own futures."[19]

At first, it may seem puzzling that a movement seeking to shed a controversial image would willingly tie its cause to abortion, but even after 1973, right-to-die supporters linked the two causes. Supporters of a right to die did not always mention the Supreme Court's decision by name. Even when invoking *Roe*, the movement rarely adhered to the language of the Court's opinion. Often, activists instead referred to popular interpretations of the decision, particularly those centered on choice, autonomy, and self-determination. At other times, advocates mentioned *Roe* to foreground a right to make medical decisions or a liberty to make choices about the most important matters in life, including when it ended.

Just the same, activists' use of *Roe* (and popular reinterpretations of it) make plain how the movement's ideas about the right to privacy had changed. When mentioning *Roe,* movement leaders began explicitly explaining their cause as one involving constitutional privacy rather than abstract human rights. In adding arguments based on *Roe* to their plan of attack, advocates also offered a clearer account of how privacy and autonomy related to one another. Rather than pointing only to bodily integrity, supporters of a right to die argued that the Constitution covered individuals' interests in controlling their identities and avoiding dependence on others. Finally, with *Roe* as precedent, activists pursued a bolder strategy, lobbying for legislation and experimenting with litigation. Members of the movement used *Roe* in court and in politics to insist that "the constitutional right of privacy [represented] the basis for withholding or withdrawing life support from a terminal patient."[20]

In the mid-1980s, CFD and SRD shared this view of the right to privacy notwithstanding a bitter conflict about whether to prioritize legislative reform. By this time, the right-to-die movement struggled with generational, ideological, and tactical differences. Because of their concern about the impact of the ill and disabled on the larger society, some veteran members preserved ties to the eugenic legal reform movement. For example, Florence Clothier Wislocki of SRD hinted at support for involuntary euthanasia,

suggesting that in cases of severe disability, parents might sometimes be "right to ask that [a] baby be allowed to die." More recent recruits viewed the movement in quite different terms. George Annas, a young attorney interested in bioethics, saw patients' rights as the next frontier in the expansion of American civil liberties. In 1975, working with the ACLU, Annas published a handbook on patients' rights. Within a year, he had become involved with CFD and served on that organization's board for decades. Fenella Rouse, a native of the United Kingdom, young mother, and recent graduate of Columbia Law School, connected the right to die to feminism. She believed that anyone had a right to decide what to do with her own body, even if it meant refusing lifesaving treatment. She started as a staff attorney at SRD before becoming the organization's legal director and executive director.[21]

Supporters of a right to die also held substantially different views on strategy. Whereas CFD believed that public education would make advance directives effective, SRD championed a model statute recognizing their validity. Because legislation would clear up doubts about enforcement and raise public awareness, SRD leaders believed that statutes were the best way to guarantee a right to choose the circumstances of one's death. For CFD, living-will legislation at first seemed counterproductive not because constitutional reasoning was too bold but because statutes could inadvertently limit patients' rights. CFD feared that if patients had a constitutional right to determine their degree of dependence on others, legislators would at best be willing to support compromise measures. One activist supportive of the CFD view explained: "It must also be borne in mind that all persons have a constitutional and common law right to refuse unwanted medical treatment. This right may not be restricted to a qualified group of patients."[22]

For some time, because of intensifying conflict between the two groups, the constitutional vision shared by members was hard to identify. CFD and SFD stayed embroiled in a bitter lawsuit for almost a decade. CFD members dreaded the costs of litigation, but after receiving a summons and complaint, the divide between the organizations became impossible to ignore. The cause of the rift remains disputed. Dinsmore Adams, a prominent attorney and then-member of the CFD board of directors, still insists that SRD held its sister organization for ransom. For their part, SRD leaders believed that they deserved more of the money from a fund created by Dixie Cup magnate Hugh Moore—money they believed was earmarked for legislative battles.

Whatever the cause, SRD sued for all funds that CFD had raised for legislative initiatives.[23]

Litigation would drag on until 1985, and bad blood continued between leaders of the two groups.[24] While the leaders of CFD and SRD struggled to put aside their personal animosities, members of both groups agreed on many substantive issues, including the importance of arguments based on a right to choose. Even the recently formed Hemlock Society, an organization that endorsed "active voluntary euthanasia for the terminally ill," began articulating a broader right of choice tied to *Roe*. Founded in 1980, Hemlock came into being after co-founder Derek Humphry published *Jean's Way: A Love Story*. The book chronicled Humphry's role in the assisted suicide of his first wife, Jean, during her battle with cancer. The attention received by *Jean's Way* prompted Humphry and his second wife, Ann, to found Hemlock and advocate for legalizing assisted suicide. Encouraged by the response to *Jean's Way*, Humphry wrote another book, *Let Me Die before I Wake: How Dying People End Their Suffering*, that bankrolled Hemlock's early operations. In 1982, a legal consultant for Hemlock, Curt Garbesi, began work on a model assisted-suicide law, and the organization's membership reportedly reached 5,000.[25]

At first, notwithstanding its use of constitutional rhetoric, Hemlock championed self-help for the dying, a position that panicked members of the mainstream movement. A. J. Levinson of CFD claimed that Humphry's *Let Me Die* would "increase the rate of suicide of the young and healthy and temporarily depressed." In the short term, Hemlock's extreme position limited its influence. At the time that SRD members claimed to have influenced living-will legislation in thirteen states, Hemlock struggled to find the funds to open an office, field speakers, and put out literature. Fearing a backlash, the organization even refused to publicly name its members. Whatever their differences, Hemlock, SRD, and CFD members articulated an idea of choice that went beyond bodily integrity. Even "voluntary euthanasia," as Hemlock presented it, was "a matter of individual conscience."[26]

In the 1970s, activists with clashing values usually prioritized living-will legislation. The movement made progress in the courts as well, particularly in the high-profile case of Karen Ann Quinlan. At age twenty-one, Quinlan had lost consciousness for several fifteen-minute stretches after drinking and consuming tranquilizers. After doctors determined that she was in a persistent vegetative state, her father wanted to remove her from a ventilator. Her

physician and the hospital refused, and the matter went to court. In 1976, in *In re Quinlan*, the New Jersey Supreme Court pointed to *Roe* in recognizing Quinlan's "right to independent choice" in refusing unwanted medical treatment. Because she was not legally competent, the court further held that her father could exercise that right on her behalf. *Quinlan* could have inspired a much larger legal challenge, but given lawmakers' receptivity to advance directives, there seemed to be no reason to stray from a legislative strategy. CFD came around to the idea of living-will laws, and even Hemlock had little reason to work in the courts. Suicide rates had stayed mostly constant since 1950, with the numbers dropping over the course of the 1980s, and recorded instances of assisted suicide were even rarer. In euthanasia cases, the defendants who found their way to court rarely faced conviction, much less imprisonment. A. J. Levinson of CFD claimed knowledge of only one case—decided over fifty years earlier—in which a mercy-killing defendant served time in prison.[27]

By passing new living-will laws and improving old ones, the movement hoped to eliminate what its allies saw as unnecessary restrictions on individual self-determination. State chapters of Hemlock stressed that "[u]nnecessary suffering and expense can be diminished if people can be made aware of the need for living wills." CFD spoke for many in the movement when insisting that living wills represented "the single most effective instrument a person can have to reject artificial life-prolonging systems."[28]

Redrawing the Battle Lines

Between 1985 and 1987, developments in the courts disrupted the status quo. In 1985, when a Florida jury convicted Roswell Gilbert of first-degree murder, the light sentences and less-serious charges that had characterized mercy-killing cases seemed to be a thing of the past. Gilbert's lengthy sentence stunned Hemlock leaders, many of whom felt that the battle for legalizing aid-in-dying could no longer wait. Even SRD and CFD leaders saw Gilbert's conviction as a menacing sign. Hostile prosecutors had brought the fight to the courts, and the movement had no choice but to respond.[29]

With mercy killing back in the news, SRD went on the offensive. If the climate for living-will legislation was no longer as favorable, constitutional litigation could shore up the movement's existing gains. Starting in the 1980s,

the organization redoubled its efforts in court, becoming formally involved in twenty-three cases and supporting other attorneys behind the scenes. The organization's views of the right to die evolved during the litigation of cases like *Brophy v. New England Sinai Hospital, Inc.* (1986). Following surgery for a burst artery in his brain, Paul Brophy, a fireman, fell into a persistent vegetative state. Believing that Brophy would never fully recover, his family asked physicians to stop hydration and nutrition. The Massachusetts Supreme Judicial Court decided that the hospital could refuse but allowed for the possibility that Brophy could be moved to a facility that would comply with the family's directive.[30]

SRD presented *Brophy* as a landmark win. In that case, the court reiterated that constitutional rights to choose extended to competent and incompetent patients. *Brophy* also hinted that the right to die protected interests beyond those already recognized in abortion jurisprudence, including "the value of human dignity."[31]

Immediately before *Brophy*, other state courts had reached similar decisions. Encouraged by these signs of progress, SRD raised money to file more friend-of-court briefs, framing their cause as an extension of the rights already at work in *Roe*. *Brophy* and cases like it made more explicit new ideas about the breadth of choice—a concept of self-determination that protected an individual's ability to control her identity and avoid dependence. Evan Collins of SRD explained: "Those of us who support the precious right to choose are deeply indebted to the Brophys for what they have done."[32]

A year after the *Brophy* decision, the movement celebrated a California court's decision in the case of Elizabeth Bouvia, a woman with cerebral palsy. In 1982, Bouvia graduated from the University of San Diego with a degree in social work. The same year, she married a former convict she had met through prison correspondence. A year later, her life took a much darker turn. Rocked by a recent miscarriage and deeply unhappy with her marriage, Bouvia checked herself into Riverside General Hospital and asked to be cared for while she painlessly starved to death. When the hospital denied her request, she sought assistance from the Southern California ACLU.[33]

Richard Scott, an ACLU attorney and founding member of Hemlock, took her case. Scott had worked for years as an emergency-room physician while he and his wife were trying to adopt a Vietnamese orphan. Frustrated by the thicket of laws governing the adoption, Scott applied to law school

and went on to practice in the area of civil liberties. After taking Bouvia's case, Scott described her interest in self-determination as a logical corollary of the principles set forth in *Roe*. "To permit her to pass on quietly, with peace, privacy, and dignity," Scott argued in his complaint, "would be an example of the recognition of fundamental rights of choice."[34]

In 1987, the California Second District Court of Appeal held that Bouvia had a "basic and fundamental" right to refuse unwanted treatment. The court spotlighted what it called Bouvia's "right to choose." In speaking to the media, Scott similarly emphasized a broad concept of self-determination. "Respect for life is most evident by letting the person living that life make the choices," he said. "And it's not just the easy choice—whether you want the bed nearer or farther from the window. You get to make all the choices."[35]

While Bouvia's case sparked opposition from disability-rights activists, legal victories emboldened the right-to-die movement. The arguments made in cases like *Bouvia* relied on novel ideas about constitutional privacy. To be sure, activists and attorneys compared abortion and the withdrawal of treatment by highlighting patients' shared interest in bodily integrity. Much as women seeking abortion did not wish to endure an unwanted pregnancy, those seeking to reject forcible hydration and nutrition wanted more control over their lives and bodies. However, as those supporting a right to die saw it, the value of controlling one's identity and independence from others was at the heart of Bouvia's case.

Progress in cases like *Bouvia* transformed the movement as well as its arguments. Hemlock and its allies had particular success in expanding. Faye Girsh, a forensic psychologist, was one of those who mobilized in the 1980s. She had made a name for herself studying juries and the death penalty. In 1983, at the request of the Southern California ACLU, Girsh examined Elizabeth Bouvia. When she concluded that Bouvia was competent to make the decision to die, Girsh was inundated with calls and letters from families and patients. In 1986, convinced that something had to change, she hosted a conference on the right to die. It seemed to her that most attendees were "rehashing the same stuff about advance directives" while Hemlock members recognized that advance directives were often not enough. Girsh became a committed convert, starting a chapter of Hemlock in 1987 and later playing a leading role in many right-to-die organizations, including Hemlock USA.[36]

Girsh's experience testified to Hemlock's rising visibility in national politics. Working with Hemlock, California attorneys Bob Risley and Michael White put assisted suicide on the state ballot in 1988, creating an initiative that would legalize aid-in-dying when physicians certified that a patient had six months or less to live. Boasting 30,000 members in 42 chapters, Hemlock pressed on after failing to get enough signatures for the California initiative, seeking to put assisted suicide before voters in Washington, Oregon, and Florida in the coming years. In 1989, the group tried again to convince voters to legalize aid-in-dying, this time in Washington State.[37]

CFD and SRD focused on the right to refuse food and water as well as medical treatment. SRD celebrated the decision of *Conservatorship of Drabick* (1988), where a California appellate court allowed a guardian to decide to remove the feeding tube of a patient in a persistent vegetative state. As SRD and CFD leaders hoped, decisions like *Drabick* would clarify that all patients had a right to refuse both "heroic measures" and food and water. The movement also hoped to capitalize on advances in state legislatures, appealing to lawmakers already invested in the idea of a right to choose. "A consensus has emerged on the legal right to withhold or withdraw feeding," SRD legal brochures asserted. "The right to reject it is generally protected by both the state and federal constitutions."[38]

The movement also took advantage of changes in the larger society. Concern about aging and death soared in the late 1980s and 1990s. Between 1950 and 1990, the number of people sixty-five and older more than doubled, from 12 million to 30 million. Dealing with the emotional toll of the death and aging of their parents, baby boomers—born between 1946 and 1964—counted among the strongest supporters of what they saw as death with dignity. For some elderly Americans, spiraling medical costs bolstered support for assisted suicide. One study of long-term care in Texas conducted in the 1980s found that even the lowest cost nursing-home facilities matched or exceeded the average income of state residents over sixty-five.[39]

The AIDS epidemic also infused the movement with new energy. Between 1981 and 1995, over 400,000 Americans faced an AIDS diagnosis, and over half of those diagnosed had passed away. In a study of AIDS patients in New York City conducted between 1985 and 1988, the suicide rate of men with AIDS between ages twenty-six and fifty-nine was thirty-six times that of the

general population. While some saw better treatment as the only response to the AIDS epidemic, others believed that the stigma, pain, and emotional burden of living with AIDS justified a right to die.[40]

Excited about the future, the movement put more emphasis on novel ideas about the right to privacy. Before the late 1980s, supporters of a right to die had mostly mentioned the *Roe* decision when litigating, rallying supporters, and discussing strategy internally. In lobbying for living-will laws, by contrast, activists had often emphasized the practical benefits of advance directives. Later, with progress in the courts and aid-in-dying on the agenda, the movement more often framed its cause as a vindication of the right to privacy.

It might not be surprising that litigators relied on *Roe*. Lawyers often turn to established case law when seeking recognition of new rights. However, arguments based on the right to choose also figured centrally in the movement's effort to raise money, persuade legislators and voters, energize members, and shape popular opinion. By invoking established constitutional law, activists positioned their demands for social and legal change as a logical extension of deeply-rooted American traditions. On some occasions, movement members did not mention *Roe* by name, instead relying on then-common popular reinterpretations of the decision centered on a right to choose or to control one's body. For example, the Florida chapter of Hemlock, the Association for Dignity in Death and Freedom in Life, frequently relied on the ideas of privacy and choice in its recruiting materials, insisting that, because of decisions like *Roe*, "[w]hat we do with our life or our body is our own private affair."[41]

By 1990, proponents of the California assisted-suicide initiative had incorporated choice arguments into the text of the bill and the materials promoting it. "Self-determination is the most basic of freedoms," argued those in favor of the bill. "The right to choose to eliminate pain and suffering, and to die with dignity at the time and place of our choosing when we are terminally ill, is an integral part of our right to control our own destiny."[42]

CFD leaders used similar claims to rally recruits and raise money. In outlining the importance of the Court's upcoming ruling in *Cruzan*, Deming Holleran argued that the justices were "poised to make an historic ruling on your right to choose."[43] SRD leaders relied on choice arguments in popularizing their cause. The group put out a new video and coined a catchphrase: "The right to die—the choice is yours."[44]

These arguments relied on the salience, familiarity, and even popularity of the idea of a right to choose, but activists used such arguments in bold new ways. CFD and SRD described a constitutional choice that mattered not only because of a patient's interest in bodily integrity or freedom from sex discrimination. Activists also asserted that the constitutional choice recognized in *Roe* naturally extended to a patient's ability to control how she saw herself, how long she depended on others, and how she died.[45]

The Baby Doe Wars

With the spread of living-will laws, resistance to the idea of a right to die spread. As early as the 1970s, abortion opponents had spoken out against euthanasia, but with its resources committed to a constitutional amendment banning abortion, the movement dedicated relatively few resources to end-of-life issues. By the mid-1980s, pro-lifers made opposition to living-will and assisted-suicide laws a core priority. At the same time, opposition spread beyond the antiabortion movement, as disability-rights activists connected a right to die to concerns about discrimination, resource constraints, and demands for independent living. Both groups developed important ideas about constitutional privacy and its relationship to all Americans' interest in equal treatment.

Pro-lifers argued that both abortion and euthanasia involved discrimination against the helpless. By contrast, disability-rights activists asserted that the issue of equal treatment distinguished abortion from a supposed right to die: while opponents of damaging sex stereotypes should fight for legal abortion, generalizations about the worth of the disabled offered a reason not to legalize either assisted suicide or the withdrawal of treatment. Those in the disability-rights movement also argued that constitutional privacy deserved support only when the government gave vulnerable people the financial means to make any choice. As important, disability-rights advocates asserted that those advancing a right to die did not propose assisted suicide for just anyone. Instead, as these activists argued, the opposition seemed interested in singling out those with disabilities or diseases. While disagreeing with one another on policy matters, activists insisted that a constitutional right to choose could not be separated from constitutional interests in equal treatment for the elderly, disabled, and dependent.

Equality arguments first surfaced during the "Baby Doe" wars of the early 1980s. In Bloomington, Indiana, a child born with Down syndrome suffered from esophageal atresia, a defect that physicians could often correct with surgery. After the child's parents declined treatment, the hospital went to court to reverse the decision. When lawyers for the hospital lost in state court, they pursued an emergency appeal, but Baby Doe died before the Supreme Court reached a decision. The pro-life movement jumped on the case, and public outcry about the case drew the attention of Congress and the White House. President Reagan ordered the Department of Health and Human Services (HHS) to withhold federal funding from any facility that refused to provide lifesaving care to severely handicapped newborns, citing the Rehabilitation Act of 1973, a law prohibiting disability discrimination in federal programs.[46]

In March 1983, HHS issued regulations based on the Rehabilitation Act, and the American Academy of Pediatrics, the National Association of Children's Hospitals, and the Children's National Medical Center challenged them in court. In *American Academy of Pediatrics v. Heckler*, the district court struck down the rules on procedural grounds. In the same year, Baby Jane Doe was born in Long Island, New York. Jane Doe also suffered from a defect correctable with surgery, but because of several handicaps, physicians informed her parents that she would be severely physically and mentally handicapped if she survived. When Baby Jane Doe's parents initially refused surgery, a pro-life attorney, Larry Washburn, sought appointment as guardian ad litem in state court, and the Reagan Justice Department asked the federal courts to intervene, invoking the Baby Doe Rules to force the hospital to release medical records.[47]

In the meantime, in January 1984, the Reagan administration issued final Baby Doe Rules, and Congress amended the federal Child Abuse Prevention and Treatment Act to cover disabled newborns. After the American Medical Association (AMA) and the American Hospital Association again attacked the Baby Doe Rules, the case eventually reached the Supreme Court. In *Bowen v. American Hospital Association*, the Court struck down the regulations, holding that mandatory requirements outlined in the rules found no justification in the Rehabilitation Act.[48]

While the HHS regulations fared poorly in the courts, the Baby Doe Wars helped to forge what the *Disability Rag* called a "strange" alliance between

abortion opponents and disability-rights activists. The National Right to Life Committee (NRLC), the largest national antiabortion group, joined Washburn in championing the Baby Doe regulations. Founded in 1979, the Disability Rights Education and Defense Fund (DREDF), a disability-rights group committed to lobbying and public education, also took part in the Baby Doe case. "The kind of health care that people with disabilities have been able to obtain," DREDF argued in an amicus brief in the Baby Jane Doe case, "has at times depended . . . on society's perception of the disabled as sick, and, therefore, inferior." The Association for Retarded Citizens of the United States (ARC, now called the Arc of the United States), another disability-rights group, similarly sided with the Reagan administration. In a press release, ARC "put physicians on notice that they should not speculate about the quality of life for newborn infants who are mentally handicapped."[49]

The Baby Doe debate also witnessed the development of new arguments linking medical care and equal treatment. DREDF and ARC rejected the idea that the right to privacy recognized in *Roe* naturally extended to parents' ability to make decisions about severely handicapped newborns. While sometimes identifying the fight for abortion rights with an effort to uproot sex stereotypes, members of the disability-rights movement later contended that in the Baby Doe wars, constitutional equality principles cut the other way. Imagining that they would prefer anything to a life with a disability, physicians made judgments based on their own biases.

An Organized Opposition

Immediately after the fight over the Baby Doe Rules, national antiabortion organizations took the lead in opposing a right to die. The Catholic Church had been the primary opponent of euthanasia supporters before the 1960s, but with the creation of a secular antiabortion movement, the church more often worked behind the scenes. Mainstream antiabortion activists had seen involuntary euthanasia as a threat since the movement organized. Groups like the NRLC argued that the legalization of abortion represented a larger cultural shift—what one activist called a "counterculture [that] says quality of life is more important than life itself."[50]

At first, pro-lifers mostly incorporated euthanasia arguments into their abortion policy. After the Baby Doe controversy, the movement took concrete

steps to change the law on end-of-life issues. In 1984, James Bopp Jr., the general counsel for the NRLC, founded the National Legal Center for the Medically Dependent and Disabled, a public-interest litigation group designed to "represent the critically ill and disabled . . . who may be subject to discrimination in the delivery of beneficial medical care."[51] Rita Marker, another movement member, founded the International Anti-Euthanasia Task Force (IAETF) in 1987, operating out of the Human Life Center at the University of Steubenville in Ohio. Like Bopp, IAETF contended that the right to withdraw treatment relied on the kind of assumption about the worthlessness of dependent Americans that had driven the *Roe* Court—a belief that "[t]o be disabled is to be . . . grossly inferior."[52]

The pro-lifers who led the euthanasia fight saw it as a chance to avoid a second *Roe v. Wade*. Bopp sounded the alarm immediately after the Baby Doe cases. He considered himself a conservative and had played an instrumental part in forging the pro-life movement's relationship with the Republican Party. But when it came to euthanasia, Bopp tried to build a different coalition. His organization submitted amicus briefs, hosted conferences on the problems with a right to die, and helped to publish articles promoting the pro-life position in the medical literature. Bopp and his allies hoped that this campaign would create an alliance much broader and less partisan than the one contesting the abortion wars. It was particularly important, he believed, to consolidate the support of disability-rights activists who belonged to "the liberal coalition."[53]

Ed Grant, the executive director of Americans United for Life (AUL) in the mid-1980s, also saw the campaign for the right to die as a profound menace. He joined the pro-life cause as a law student at Northwestern University, where one of his professors, Victor Rosenblum, a leading member of AUL, kindled a lifelong interest in what he saw as a right to life. Grant became the organization's executive director in 1986, and he helped lead the organization's fight against euthanasia in the years to come. At a 1991 strategy conference, Grant urged his colleagues to "compel reflection upon the impact of turning killing into a fundamental medical service." Although recognizing that the battle could be "more complex than the abortion debate," he stressed the importance of framing the issue. As he put it: "[W]e should be talking about mercy-killing bills, we should be talking about killing

competent patients, we should be talking about the inexorable logic of euthanasia."[54]

Grant and Bopp's allies debated how to fight the withdrawal of treatment or assisted suicide without alienating Americans who not yet made up their minds about end-of-life issues. "How can we advocate denying death to those who want it, especially if they are suffering greatly?" asked Minnesota Citizens Concerned for Life, an NRLC affiliate. The *National Right to Life News* similarly stated in 1987: "Aggravating the problem for pro-lifers is [that] rhetoric such as 'the right to die' resonates powerfully with our preference for American individualism."[55]

To avoid the appeal of freedom-of-choice arguments, pro-lifers borrowed from the stereotyping arguments that feminists had used to question abortion bans. Feminists had argued that pro-lifers backed abortion restrictions because they remained wedded to archaic generalizations about women's roles. As the pro-life movement picked up momentum, feminists also pointed out that women who chose childbirth over abortion did not do so freely but partly because of the stigma associated with the procedure and state and federal laws cutting off funding for abortion. In the context of death and dying, pro-lifers responded that the push for new laws on withdrawal of treatment reflected and reinforced stereotypes about the dependent and the sick. Instead of arguing against freedom of choice, pro-lifers simply contended that abstract ideas of liberty concealed the abuse and coercion that many vulnerable patients faced.[56]

At the same time, through involvement in a series of cases, disability-rights activists slowly developed their own analysis of laws on assisted suicide. Rather than arguing that opposition to legal abortion and euthanasia were one and the same, these activists often distinguished women's right to choose from end-of-life issues. Some argued that whereas women fought for legal abortion as part of an effort to uproot pernicious stereotypes, many disabled individuals chose to die because of societal stereotyping and neglect. While women might genuinely exercise self-determination in terminating a pregnancy, disabled individuals chose to end their lives because the government had failed them.

In California, the independent-living movement and DREDF first made these arguments in condemning the outcome of *Bouvia*. When Richard Scott

took Bouvia's case, disability-rights activists protested outside the Southern California ACLU Los Angeles office. Paul Longmore, who considered himself a civil libertarian, demanded that the ACLU drop the suit and rescind any policy the organization had in place endorsing a right to die. Carol Gill, a psychologist and prominent disability-rights activist, also insisted that Bouvia's case stemmed from deep bias against the disabled. "What comes through in the papers filed by the plaintiff's counsel is that it is better to be dead than to be disabled," Gill stated. "This value judgment is a primary component of society's failure to support the disabled person's quest for a full life."[57]

Activists like Longmore argued that the setbacks Bouvia faced—a failed marriage and a miscarriage—would never have justified the withdrawal of treatment for someone without a disability. Nor, as some contended, would Bouvia have the same degree of support if she had asked for financial and emotional aid in independent living. "Elizabeth Bouvia has found more support for her attempt to end her life than for any of her valiant efforts to live with dignity," argued Longmore. "If this ruling results in her death, it will be a victory not for self-determination but for bigotry."[58]

It was not Bouvia but another woman, Nancy Cruzan, who would put the issue of a right to die at the center of national conversation. When the Supreme Court heard Cruzan's case, debate about the balance between choice and equality exploded onto the national stage, forcing more Americans to consider what it meant to discriminate in end-of-life medical care.

The *Cruzan* Consensus

When the Supreme Court took her case, Nancy Cruzan had been in a persistent vegetative state for years. Knowing that Nancy would never regain her full mental capacity, her parents asked medical professionals to stop artificial nutrition and hydration procedures. When the hospital refused their request, the Cruzans successfully petitioned a Missouri court. After 1988, when the hospital won its appeal at the Missouri Supreme Court, the United States Supreme Court intervened. Activists on both sides questioned whether *Cruzan* would be the *Roe v. Wade* of the right-to-die movement.[59]

Joined by organizations like the AMA, the AIDS Civil Rights Project, and the American Geriatrics Society, attorneys for both CFD and SRD argued

that *Cruzan* turned partly on the meaning of constitutional choice. "Our choices about how to deal with incurable and irreversible sickness are as personal and fundamental as our decisions about how to rear children or who to marry," SRD argued. Choice also involved a patient's ability to control her identity and independence. CFD specifically invoked *Roe* and other abortion cases, explaining: "Nancy Cruzan did not lose her human dignity when she lost consciousness."[60]

Implicit in CFD's argument was one of the central questions in *Cruzan:* How did the principles of patient choice apply to incompetent patients? CFD and SRD urged the Court to adopt what was called substituted-judgment doctrine: designating a proxy decision maker who could identify what the patient would want for herself. As SRD and CFD framed the issue, the Missouri law made it too hard for a proxy to prove that a person no longer wanted to live. Requiring clear-and-convincing evidence—a demanding standard—discriminated against her and other incompetent persons whose wishes would never be respected.[61]

For antiabortion and disability-rights activists addressing substituted-judgment doctrine, discrimination had a quite different meaning. Free Speech Advocates, an antiabortion group led by the founders of Jay Sekulow's American Center for Law and Justice, contended that the Missouri clear-and-convincing standard honored the incompetent by protecting them from abuse. In its brief before the Court, the Association for Retarded Citizens of the United States maintained that substituted judgment too easily gave way to an assumption that "the state's interest in the preservation of life *must* diminish as 'quality of life' declines."[62]

In June 1990, the Supreme Court upheld the constitutionality of the challenged Missouri law by a vote of five to four. Authored by Chief Justice William Rehnquist, the majority agreed with SRD and CFD that the Constitution offered some protection to those refusing unwanted medical treatment. *Cruzan* recognized a liberty interest grounded in the idea that "the notion of bodily integrity" generally required "informed consent . . . for medical treatment." However, the Court upheld Missouri's clear-and-convincing standard, concluding that the standard permissibly served important state interests.[63]

In setting forth three valid purposes for the Missouri law, *Cruzan* first rejected the idea that substituted judgment advanced, rather than undermined,

patient self-determination. Next, the Court echoed concerns about the relationship between substituted judgment and potential discrimination, identifying a valid state interest in "guard[ing] against potential abuses." For the majority, advancing patient equality meant that a "State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."[64]

For many observers, the core message of *Cruzan* came not in the majority's discussion of human life or equal treatment but in Justice O'Connor's concurrence. While joining the majority, O'Connor wrote separately to suggest that states may have a constitutional obligation to honor an incompetent patient's refusal of hydration and nutrition if she had previously appointed a health-care proxy.[65]

At first, *Cruzan* appeared to have resolved most of the doubt surrounding any right to die, creating autonomy only for those who had an advance directive in place. By the summer of 1990, only eight states had not yet passed a living-will law, and all but one of them had such a bill under consideration. The American Bar Association (ABA) responded to *Cruzan* by calling for a public-education initiative on living wills. Congress seemed equally convinced, passing the Patient Self-Determination Act. The law required hospitals, nursing homes, hospices, and a variety of other providers to offer information about advance directives to adult patients at the time they entered the facility.[66]

Uninterested in pushing assisted suicide, most members of the SRD and CFD resolved to work with the rules *Cruzan* seemed to put in place. Both also reported a dramatic increase in requests for living wills. Between June and December of 1990 alone, SRD reported 800,000 requests. As the priorities of the two groups converged, members found practical and financial reasons to unite. In April 1990, the two groups merged, christening the new organization Choice in Dying. After a great deal of internal wrangling, the idea of choice seemed to be the only one on which members of CFD and SRD could agree. As one member put it: "the idea of the right to make a choice was a resonant issue."[67]

Choice in Dying prioritized not only privacy arguments but also responses to the discrimination accusations levied by the opposition. "[W]e

can work state by state to create uniform laws that build upon the Court's ruling," the organization explained, "and provide equal protection for every American citizen, no matter where they live."[68]

In spite of objections raised by the opposition, *Cruzan* seemed to have reached an outcome that satisfied most Americans. With the support of the ABA, the AMA, and a majority in Congress, living wills offered a common-sense and moderate solution. The consensus seemed clear: advance-directive laws would provide a way out of the right-to-die dilemma.

The *Cruzan* Consensus Falls Away

By the start of 1991, any faith in an easy resolution of the conflict had come to seem misplaced. In December 1990, a Michigan trial court dismissed first-degree murder charges against Dr. Jack Kevorkian on the theory that no state law prohibited assisted suicide. Kevorkian himself came across as a bizarre figure, a lone wolf who gave nicknames to death-delivering devices. Nonetheless, the charges against him brought to light surprising support for physician-assisted suicide. A Gallup Poll found that roughly two-thirds of respondents believed assisted suicide to be moral, at least under certain circumstances.[69]

In March 1991, Dr. Tim Quill, a hospice medical director and hospitalist in upstate New York, changed the public image of aid-in-dying when he published an article on his own experience. Quill's patient "Diane" had acute leukemia. Notwithstanding the fact that she had a 25 percent chance of survival, Diane refused treatment, began hospice care, and requested medicine to end her life if her pain could not be controlled. After consulting with colleagues, Quill agreed to her request. When medical interventions failed to help, Diane met with Quill a last time, took the medication that he gave her, and died at home with her family. After the publication of the article in the *New England Journal of Medicine*, Quill spoke out more often on the issue. He reframed aid-in-dying as a "last resort," available only when the most sophisticated palliative care had failed. He also insisted that physicians routinely helped patients avoid a bad death. Protection against abuse and discrimination came, not through paternalism, but through transparency. As Quill put it years later: "an open practice is safer and better for everybody than a secret practice."[70]

Quill's experiences began a new chapter in the fight for a right to die. The movement for legalizing assisted suicide expanded and set out a more ambitious agenda. In 1992, Humphry left Hemlock and later founded an organization of his own, the Euthanasia Research and Guidance Organization (ERGO). After Humphry's departure, in the 1990s, Hemlock brought together an increasingly diverse group of doctors, lawyers, social workers, homemakers, and grassroots activists convinced of the need to legalize assisted suicide. No longer treated as a dirty secret, aid-in-dying became the central issue in debate about the right to die.[71]

The push for assisted suicide relied heavily on arguments about *Roe* and a right to choose. Invested in litigation, Hemlock members saw *Roe* as increasingly important as action moved into the courts. Moreover, emphasizing abstract ideas about choice and self-determination mattered when the group advanced a proposition that even movement members recognized could be controversial.

Those committed to legalizing aid-in-dying crafted new arguments about the *Roe* decision. Hemlock and allied organizations first asserted that constitutional choice had to apply equally, to all important choices and to all dying patients. Hemlock reasoned that honoring only abortion rights would unfairly denigrate decisions made at the end of life, and recognizing only a right to refuse treatment would discriminate against those who required help in dying. The movement also argued that assisted suicide, like abortion before 1973, was already common. The issue was whether Americans would have the right to choose safe and regulated services. Finally, in debating strategy, supporters of aid-in-dying also compared themselves to the prochoice movement, hoping to secure a single win in court that would transform the legal landscape.

In seeking to make aid-in-dying more mainstream, Hemlock set out to rebrand itself. After the departure of Humphry, the group chose John Pridonoff, a grief counselor, from a field of sixty-five to become the organization's new executive director. Pridonoff had first taken an interest in the right to die in college after a close friend lost a painful fight with leukemia. When he took over Hemlock, he hoped to make it a credible source of information about the right to die. Pridonoff's efforts required a new rhetorical strategy. Instead of merely creating a home for the movement's firebrands, he wanted to paint Hemlock as an advocate for formal legal guarantees of equal treat-

ment for the vulnerable. In making this argument, the organization compared the legalization of abortion and assisted suicide. If a procedure remained illegal, Americans would continue to seek it out but would inevitably receive inadequate care. "Physician aid in dying happens every day—unofficially and off-the-record," Pridonoff argued. "We need to have a law on the books to prevent abuses."[72]

With a refined message, Hemlock leaders resumed their struggle to legalize aid-in-dying in Washington, California, and other states. Still prioritizing legislation, group members believed that fresh arguments would make the difference. While Hemlock had always championed a right to choose, the organization had emphasized the importance of self-help for the terminally ill, providing detailed information about painless suicide methods. In seeking to reinvent itself, Hemlock used the idea of a right to choose in emphasizing the importance of formal legal reform. A sample letter to the editor put forth the group's main argument, insisting that "[t]he time has come to legalize the ultimate personal freedom" by "working within the law."[73]

Hemlock hoped that choice arguments would attract new coalition partners, including feminists. The group's effort paid dividends. In Washington, the state affiliate of the National Organization for Women (NOW) lobbied for legalizing assisted suicide. When Washington's Initiative 119 fell, feminists called for aid-in-dying in California. For California NOW, laws limiting assisted suicide reinforced a noxious form of gender paternalism. NOW's claims had some evidentiary foundation. A 1990 study published in the *Journal of Law, Medicine, and Ethics* exposed gender differences in the treatment of patients at the end of life. In cases involving women, courts more often were skeptical of evidence that a person preferred to terminate care, referred to patients by their first names, and supposedly described women as "unreflective and vulnerable."[74]

In endorsing California's assisted-suicide law, NOW leaders stressed that "[t]he medical profession and the courts ha[d] demonstrated a paternalistic attitude toward women." NOW members argued that a law legalizing assisted suicide would advance interests in constitutional sex equality by undermining gender paternalism. The state effort to legalize assisted suicide eventually fell short, but choice arguments strengthened the new partnership between some feminists and advocates for assisted suicide. As NOW

explained, such a law would "empower all terminally ill, mentally competent adults, men and women."[75]

Buoyed by the support of new partners, advocates of legalizing assisted suicide also experimented with different tactics. Hemlock USA specialized in lobbying state legislatures. Founded in 1993, Oregon Right to Die (later, Oregon Death with Dignity) created a political action committee designed to sway voters. The same year, Ralph Mero, a former Hemlock regional director, helped to found Compassion in Dying to offer "direct assistance to people considering ending their lives." Members of the group had stood "prepared to engage in civil disobedience" but instead concluded that "suicide offered only to terminally ill patients might cause local authorities to withhold efforts to prosecute." The group sent representatives to help terminally ill patients procure prescriptions and stayed with them while they died. Later, Compassion in Dying would focus on constitutional litigation, seeing it as the fastest path to victory. Members of the organization would make the comparison to *Roe* and abortion rights a central part of their strategy.[76]

Interest in assisted suicide prompted members of the mainstream movement to reevaluate their positions on aid-in-dying. At first, Choice in Dying solicited feedback from its members rather than taking a firm position. Movement commentators debated the merits of pushing for aid-in-dying. John Pridonoff argued that constitutional choice protected broad interests in "dignity, integrity, and self-respect" that reached assisted suicide. Some commentators agreed that the right related to an individual's "loss of self." Others saw a push for assisted suicide as unnecessarily risky. The new leadership of Choice in Dying mostly echoed this argument. Karen Orloff Kaplan, the new executive director, insisted that the group should primarily educate patients about the rights they already had. "Legal confirmation of this right does not ensure its practice," she contended. "All too often, providers do not help patients exercise their right to decide their own end-of-life care."[77]

However, by 1994, activists' positions had hardened. While leaders of Choice in Dying refused to take a position on assisted suicide, Hemlock and allied organizations championed legalization of aid-in-dying. Advocates made these arguments in fighting to legalize assisted suicide in Oregon. In November, these efforts paid off, and Oregon became the epicenter of the campaign to legalize physician aid-in-dying. In Oregon, some had downplayed constitutional arguments, fearing that they would alienate pro-life voters. In

other states, however, movement leaders often bet that choice arguments were worth the risks. The movement had relied on this rhetorical strategy to convince key allies, including feminists, to endorse aid-in-dying. Activists also wanted to effectively distance themselves both from the early euthanasia movement and from the radical image that had defined Hemlock in years past. Compassion in Dying saw more potential in a comparison to the pro-choice movement. If the Supreme Court could guarantee equal rights to all Americans in one decision, some wanted to convince the courts to issue a decision as sweeping as *Roe v. Wade*.[78]

Litigating the Relationship between Abortion and Assisted Suicide

The open campaign for assisted suicide triggered a more intense opposition. As pro-life organizations channeled more resources into the struggle, disability-rights activists mounted a more organized attack. While pro-lifers played up the connection between reproductive choice and self-determination in dying, disability-rights activists separated the issues, focusing on the discrimination and lack of resources that they believed made "choice" in dying nothing more than an empty phrase.

The next round in fights about equality and assisted suicide began when James Bopp Jr. and the NRLC challenged the constitutionality of the Oregon law in federal court. In *Lee v. State*, a group of plaintiffs argued that the Oregon law violated the Fourteenth Amendment, the First Amendment, and the federal Americans with Disabilities Act. The lawsuit raised novel questions about the relationship between discrimination and the right to die. Were the terminally ill disabled, and did terminal illness therefore represent a suspect classification—similar to race—under the Fourteenth Amendment? Did the Oregon law allow citizens to opt out of otherwise applicable protections, or did the law degrade the disabled by denying them criminal and civil safeguards available to other Oregon residents? In December 1994, an Oregon district court agreed to enjoin the law until the courts resolved questions about its constitutionality.[79]

With a decision on the merits coming soon in *Lee*, abortion opponents insisted that elderly and disabled patients needed protection, not autonomy. Much as legal abortion deprived the fetus of otherwise applicable protections,

legalizing assisted suicide would reflect the lack of value society attached to the disabled. "We don't allow non-terminal patients the same 'freedom' because we see their lives as worth protecting even when they are tempted to see themselves as worthless," the *National Right to Life News* explained.[80]

Hemlock and its allies responded with equality arguments of their own. In the mid-1990s, at Hemlock USA's national conference, attendees heard speeches explaining that laws banning assisted suicide "discriminate against patients who do not require life-sustaining treatment." Hemlock leaders argued that if the withdrawal of treatment remained good law, banning assisted suicide discriminated against patients who wished to die but did not depend on life support. As one Hemlock member explained: "[N]ot every patient is in a position to end his or her own life without help."[81]

In April 1995, the district court in *Lee* rejected this argument and enjoined enforcement of Oregon's assisted-suicide law. The court did not decide whether the terminally ill enjoyed a fundamental right to protection from assisted suicide. Instead, *Lee* reasoned that there was no rational basis for the law. Conceding that the government may have "a valid public policy . . . based on principles of autonomy," the court reasoned that the law did not put in place enough safeguards to protect against coercion. The court echoed NRLC's argument about "selective freedom"—the idea that certain freedoms of choice barely disguised discrimination. As the district court in *Lee* reasoned: "Measure 16 provides a means to commit suicide to [persons] who may be competent, incompetent, unduly influenced, or abused by others."[82]

Litigators challenging New York's and Washington's bans on assisted suicide developed a very different idea of the relationship between constitutional choice and equal treatment. In 1993, New York State had convened a panel to reconsider its existing ban but ultimately decided to keep it in place. Joined by other physicians, Timothy Quill filed suit, arguing that the "reasoning and holdings of the Supreme Court in *Roe* and [its progeny] are broad enough to establish that there is a fundamental right on the part of a terminally ill patient to decide to end his life, and to do so with . . . assistance."[83] Quill also contended that the New York law violated the Equal Protection Clause by allowing patients to die only when they could do so by refusing treatment. In Washington, Compassion in Dying also pointed to abortion jurisprudence, explaining that "the suffering of a terminally ill person cannot

be deemed . . . any less deserving of protection from unwarranted governmental interference than that of a pregnant woman."[84]

The Washington and New York plaintiffs both modeled their strategy on the litigation that produced the *Roe* decision. As one right-to-die newsletter explained: "If successful at the Supreme Court level, this [tactic] would set a legal precedent for doctor-assisted suicide in the same way the US Supreme Court's decision in *Roe v. Wade* led to the legalization of abortion."[85]

This strategy partly reflected the Supreme Court's own reworking of the *Roe* holding in the 1992 decision of *Planned Parenthood v. Casey*. Faced with a request to overrule *Roe,* the Court demurred. In practical terms, *Casey* seemed to provide less protection for abortion than *Roe*, replacing the trimester framework from the 1973 decision with a less demanding test. Under the trimester framework, states had little ability to regulate abortion in the first trimester; in the second trimester, states could act only to protect women's health, and the government could protect fetal life only after viability. By contrast, *Casey* applied the undue-burden standard, which asked whether a law had the purpose or effect of creating a substantial obstacle for women seeking abortion. Rhetorically, the *Casey* plurality also redefined the right to privacy. *Casey* first paid more attention to the importance of women's interest in freedom from sex stereotyping, reasoning that a woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role." *Casey* also framed constitutional freedom of choice in more abstract terms. "At the heart of liberty," the plurality stated, "is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." The litigation of *Quill* and *Compassion in Dying* first turned on whether *Casey* had recognized a broader right to constitutional choice.[86]

Initially, this approach delivered uneven results: while the plaintiffs in *Compassion in Dying* prevailed, the *Quill* plaintiffs failed to convince the court of their reading of the Constitution, and in March 1995, a three-judge appellate panel reversed the district court decision in *Compassion in Dying.* By the following spring, the movement's fortunes seemed to have turned. In April, in *Quill v. Vacco*, the Second Circuit Court of Appeals rejected a comparison between the right to aid-in-dying and the right to abortion. Nonetheless, the court concluded that New York's law violated the Equal Protection Clause. In overruling the lower court's decision in *Compassion in Dying*, the Ninth Circuit saw deep connections between abortion and assisted suicide. According

to the court, *Roe*'s right to privacy suggested that "[a] competent terminally ill adult . . . [has] a strong liberty interest in choosing a dignified and humane death rather than being reduced at the end of his existence to a childlike state of helplessness."[87]

Following the decision of *Compassion in Dying* and *Vacco*, state groups in favor of assisted suicide relied more heavily on *Roe* and its progeny in outlining the breadth of a right to die. These organizations described a right to privacy that went beyond the one recognized in *Casey* or *Roe*. Activists presented *Roe* as a symbol of individuals' right to control not just their bodies but also their identities. They argued that those who cherished their independence and strength had a right to avoid the weakness that came with dependence. Oregon Right to Death with Dignity described a right to choose that covered "the meaning, the story, even the sanctity of [individuals'] lives." In raising money, Compassion in Dying asserted that "no issue of personal freedom and individual self-determination can be more profound than the right to control our own destiny during our final days." Indeed, Compassion in Dying argued that the right to die enjoyed more popular support than did any reproductive liberty: "Many who would oppose a woman's abortion option on the grounds that there is another life to be considered, see no such moral issue in assisted death."[88]

Assisted Suicide Before the Supreme Court

With the issue headed to the Supreme Court, debate about the nature of constitutional choice revealed fault lines on either side of the fight for assisted suicide. Together with their state allies, Hemlock leaders eagerly anticipated the Court's decision. By contrast, on the East Coast, many members of the movement mainstream reacted to *Compassion in Dying* with ambivalence. Some did not agree that assisted suicide necessarily advanced patients' rights, particularly since some champions of aid-in-dying focused on physicians' freedom from liability. Others, like George Annas, believed that the justices would "come out the other way" and that the case would "set back the movement."[89]

Leading national antiabortion organizations also relished an opportunity to debate the connection between abortion and end-of-life care. NRLC argued that the Ninth Circuit's decision in *Compassion in Dying* struck another

blow against elderly and disabled persons already affected by the rationing of health care. Unless the Supreme Court reversed the trend, the courts would soon make real the nightmare predicted by pro-lifers since the 1970s. "Persons who are not terminally ill but who have mental illnesses and disabilities, or children with disabilities," NRLC argued "[could] be put to death by their surrogates or guardians."[90]

The Court's intervention also inspired more organized opposition on behalf of the disability-rights movement. Although some in the movement had opposed aid-in-dying since the Baby Doe wars of the 1980s, by the 1990s, more made the fight against assisted suicide their cause. One of those advocates, Diane Coleman, had used a wheelchair since she was eleven years old. Coleman still recalls that she had cried when, as a teenager, she saw the mistreatment of civil-rights protestors, but it took her much longer to see that disability could also be an issue of equal treatment.[91]

Later, when she went to California and found a series of disabled mentors, Coleman became politically active. By the early 1990s, Coleman had moved to Tennessee, where she oversaw a gathering of disability-rights activists. Coleman and her friends worried that the public misunderstood the nature of their opposition, viewing opponents of a right to die as "just tools of the Christian Right." As Marilyn Golden of DREDF argued, disability-rights advocates usually rejected the antiabortion movement's analysis of end-of-life issues, and disability-rights advocates agreed only that women considering abortion should have "direct exposure to the full potential and quality of life available to people with disabilities."[92] To correct any misimpression about the nature of opposition to aid-in-dying, Coleman and her allies formed a new group, Not Dead Yet (NDY).[93]

In the next decade, NDY would persuade a variety of disability-rights groups, including ARC, DREDF, Americans Disabled for Attendant Programs Today (ADAPT), the National Council on Disability (NCD), the National Council on Independent Living, and The Association for the Severely Handicapped (TASH), to take a stand against the legalization of assisted suicide. In the mid-1990s, NDY also encountered indifference and hostility from some rank-and-file members of other disability-rights organizations. The group nevertheless expanded by offering a new angle on the problems with assisted suicide. While pro-lifers likened assisted suicide to abortion, NDY members took no official position on reproductive rights. Many, probably most, in the

group favored legal abortion and sympathized with the women's movement. Instead of comparing opposition to the *Roe* decision and opposition to assisted suicide, NDY drew on the kind of antistereotyping argument that some feminists used in attacking abortion regulations. According to NDY, laws allowing aid-in-dying would strengthen pernicious stereotypes about the disabled. As the group's materials explained: "No proposed assisted suicide law applies to all citizens equally, but singles out individuals based on their health status in violation of the Americans with Disabilities Act."[94]

NDY members also used arguments similar to those that feminists had used about the preconditions for meaningful choice. In the 1970s and beyond, in lobbying against restrictions on the Medicaid funding of abortion, feminists had asserted that women had no real reproductive liberty unless the government ensured that poor women had the means to act on their decisions. NDY leaders used similar logic, arguing that disabled individuals chose assisted suicide because the government did not provide the means for independent living. As NDY leaders reasoned: "The courts, the press and public are so prejudiced against disabled people that they have ignored the factors that might make anyone suicidal, and have focused only on the disability."[95]

By January 1997, when hundreds of NDY members protested on the courthouse plaza, the Supreme Court was hearing oral argument in *Compassion in Dying* (later entitled *Washington v. Glucksberg*) and *Vacco v. Quill*. Attorneys on both sides had to consider how closely to tie the fate of assisted suicide to abortion rights and the *Roe* decision. Some hoped that precedents on abortion would strengthen the case for assisted suicide, anchoring arguments in precedent and earning the support of feminists, civil libertarians, and others concerned about privacy. Others worried that the Court would not only refuse to recognize a new right but also take the opportunity to limit the one that already covered abortion.

Concerned about the Court's retreat from abortion rights, the Center for Reproductive Law and Policy asked the Court to recognize a constitutional guarantee of "decisional autonomy concerning one's body." However, the Center noted that abortion touched on constitutional issues beyond those at stake in the right to die, especially those involving equality for women. According to the Center, courts scrutinized abortion restrictions more carefully than those involving a right to die because "women need to be free to choose abortion in order to shape their destiny and role in American society."[96]

While other amici saw a closer parallel in bans on abortion and assisted suicide, the intersection of end-of-life decisions and gender bias stayed mostly below the surface. The National Women's Health Network (NWHN), an organization focused on reproductive liberty, did not play up equality arguments. Instead of spotlighting the treatment of women at the end of life, the group claimed that legalizing assisted suicide would guarantee "authentic choice" for dying patients. NWHN mentioned abortion only to criticize the underground health care many sought in the face of an assisted-suicide ban: "As with abortion services before legalization, the blanket ban against doctor-assisted suicide has created a two-tier system where the wealthy and privileged continue to exercise a fundamental right that they would deny to those they consider vulnerable to coercion."[97]

Neither the respondents nor most amici identified the same equality concerns in the abortion and end-of-life contexts. Instead, both groups defined *Roe* and *Casey* as protecting a broad right to choose that governed all profoundly important and personal decisions. Right-to-die advocates adopted a similar strategy. "Like a woman who faces an unwanted pregnancy," argued Americans for Death with Dignity and the Death with Dignity National Education Center, "a terminally ill patient faces 'suffering [that] is too intimate and personal for the State to insist, without more, upon its own vision . . . however dominant that vision has been in the course of our history and culture.' "[98]

For some opponents of assisted suicide, equality—and its relation to the *Roe* decision—was at the heart of both cases. NRLC advocated for a narrowly drawn approach to the identification of rights, rooted in history and tradition—an approach that would lead to the rejection of rights to abortion and assisted suicide. But discrimination against the disabled stood at the core of the group's brief. If the government did anything less than outlaw assisted suicide, lawmakers would define "a class and provide . . . members of the class with less legal rights than those enjoyed by the general populace."[99]

Disability-rights groups also reasoned that assisted suicide stemmed from a failure to value the disabled and the elderly. "The presence or absence of a severe disability determines whether state and local governments enforce laws requiring health professionals to protect individuals who pose a danger to themselves," argued NDY and ADAPT. "If the Constitution requires that

the state's interest in the preservation of life (through suicide prevention and other laws) is vitiated for some people because of their health status, then why should the state interest not also be discounted for other persons?"[100]

Outside of court, the NCD ultimately also took a stand against legalizing assisted suicide, borrowing from the reasoning of Not Dead Yet. While acknowledging that aid-in-dying might have "substantial" benefits, NCD found that the costs far outweighed any interest in autonomy or dignity. As NCD explained: "The pressures upon people with disabilities to choose to end their lives, and the insidious appropriation by others of the right to make that choice . . . are already prevalent and will continue to increase as . . . limitations upon health care resources precipitate increased 'rationing' of health care services."[101]

Glucksberg, *Vacco*, and Discrimination

The Supreme Court's decisions in *Glucksberg* and *Vacco* rejected the constitutional case for assisted suicide. All nine members of the Court rejected facial challenges to both the Washington and New York laws criminalizing suicide. At the same time, five justices wrote separately to offer their own views, and four members of the Court joined only the result in each case without endorsing the majority's reasoning. The crux of the disagreement lay in whether the Court should issue a narrow ruling or should instead reject the idea of a right to die in the context of assisted suicide altogether. Joined by the more liberal members of the Court, Justice Sandra Day O'Connor voted to leave questions about the existence of such a right for another day. Some, like Justices John Paul Stevens and Stephen Breyer, went further, suggesting that the application of an assisted-suicide ban might well violate the Constitution.[102]

Just the same, the equality debate that had fueled the litigation of both cases strongly shaped the Court's reasoning. In *Glucksberg*, the lead case, the majority began by addressing how the Court determined whether the Fourteenth Amendment protected a given right. As the parties' briefs indicated, this question intersected with the politics of abortion. Could the Court recognize rights or liberty interests only if they had historically or traditionally commanded respect? In *Glucksberg*, the Court embraced a narrow approach, insisting that neither the nation's history nor its tradition embraced a right to commit suicide.[103]

In following such an approach, the Court refused to identify a broad right to choose in *Roe* and its progeny. Even *Casey*, with its expansive language about liberty, did not support claims for a right to commit suicide. "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy," the majority reasoned, "does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."[104]

Concluding that the Constitution recognized no fundamental right, *Glucksberg* next considered whether the Washington law was rationally related to a legitimate government purpose. In analyzing the state's goals in passing the law, the Court's opinion reflected larger struggles about the meaning of discrimination. First, the majority held that the government still had an interest in protecting life when the individuals in question faced a terminal illness. According to *Glucksberg*, the state could legitimately protect "all persons' lives, from beginning to end, regardless of physical or mental condition."[105]

The majority also echoed countermovement arguments that legalizing assisted suicide increased the risk of discrimination, vindicating the state's interest in "protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes." Instead of questioning the competence of terminally ill or disabled patients, *Glucksberg* reasoned that the government sent a crucial message by banning aid-in-dying. As the Court explained: "The State's assisted-suicide ban reflects and reinforces its policy that the lives of terminally ill, disabled, and elderly people must be no less valued than the lives of the young and healthy."[106]

In *Vacco v. Quill*, the Court rejected the argument that banning assisted suicide discriminated against a subgroup of terminally ill patients. The Court first determined that the law neither affected a suspect class nor violated a fundamental right. Moreover, as the majority saw it, assisted suicide differed substantially from the withdrawal of lifesaving care. In theory, the cause of death was different. Whereas patients who refused treatment succumbed to the underlying illness, patients who overdosed on drugs died because of the effects of the medication. Also, in these two scenarios, physicians and patients making a decision did not necessarily have the same intention. Given the differences that the Court identified between those actively ending a life and those refusing medical care, the Court emphasized that the state could act to advance its interest in "protecting vulnerable people."[107]

For decades in the lead-up to *Vacco* and *Glucksberg*, right-to-die activists had planned to make choice arguments into a powerful weapon. Invoking *Roe* appealed to those seeking a place in a left-wing political coalition that already embraced abortion. But for some in the movement, an analogy between abortion and the right to die came to seem costly. Choice arguments could alienate potential recruits opposed to legal abortion. And autonomy arguments could not resolve the underlying conflict about the right to die. Those on both sides of the struggle claimed that they did not stand against individual privacy, but activists disagreed intensely about what meaningful choice involved. Simply invoking privacy did nothing to resolve this struggle. Pro-lifers and disability-rights activists noted that choices could be uninformed, coerced, or connected to broader problems of societal discrimination and government indifference. Even if everyone agreed about the value of choice and privacy in the abstract, the boundary between self-determination and coercion was far from clear.

Death, Privacy, and Self-Determination

For the most part, since *Vacco* and *Glucksberg*, the right-to-die movement has continued to advance, albeit much more slowly than many members had once hoped. From 1990 to 2005, the struggle over the end-of-life care of Terri Schiavo, a woman in a persistent vegetative state, kept the right to die at the center of American politics. As the Schiavo struggle unfolded, the right-to-die movement fought off both legal and political challenges to Oregon's assisted-suicide statute. In 1997, the state legislature sent a bill to voters that would have repealed the law, but the effort failed. In 1998, Attorney General Janet Reno announced that she would not use federal drug laws to punish those who carried out assisted suicides. Representative Henry Hyde (R-IL) and Senator Don Nickles (R-OK) responded by introducing the Lethal Drug Use Prevention Act, a law that would have criminalized physician-provided assisted suicide in Oregon.[108]

While efforts in Congress stalled, George W. Bush's election again threatened Oregon's law and promised to change the course of the *Schiavo* litigation. Schiavo's parents believed that Terri retained some form of consciousness and fought to keep her alive, while her husband pledged to fulfill her wish not to be kept indefinitely in a persistent vegetative state. But after

intervention by the governor of Florida, action by the president of the United States, and nineteen appeals in state and federal court, Schiavo's husband, Michael, remained her legal guardian in 2005 and vowed to get a court order mandating the removal of her feeding tube. A last-ditch attempt by Republicans to introduce federal legislation reversing this outcome fell short, and Terri Schiavo died in a Pinellas Park, Florida, hospice in 2005. The Bush administration's interest in the issue reached beyond the *Schiavo* case. In 2001, Attorney General John Ashcroft announced that the Oregon law violated the Controlled Substances Act of 1970 and threatened to revoke the medical license of any physician who helped a patient to die. Oregon immediately filed suit, and in 2006, in *Gonzales v. Oregon*, the Supreme Court voted six to three that the federal Controlled Substances Act did not allow the attorney general to overrule the state's policy.[109]

While the battle to preserve Oregon's law raged on, a handful of additional states legalized aid-in-dying. With roughly 57 percent in favor, Washington voters approved the Death with Dignity Act in 2008. In 2009, in *Baxter v. State*, the Montana Supreme Court did not address a constitutional challenge to a state law but ruled that physicians charged with homicide or other offenses could raise a consent defense. Four years later, legislators in Vermont passed a law patterned on Oregon's aid-in-dying law. In October 2015, California legalized aid-in-dying when two physicians determined that a patient had less than six months to live.[110]

New organizations claimed responsibility for these successes. First formed in California in 1994, the Death with Dignity National Center merged in 1997 with several Oregon groups, including Oregon Death with Dignity. In 2004, Compassion in Dying joined with Hemlock to become Compassion and Choices. Compassion and Choices focused on both advocacy and client services, creating branches in thirty-three states, lobbying, litigating, and offering referrals and other client services. The organization insisted that aid-in-dying was a mainstream issue. As the group's newsletter put it in 2005: "Choice in dying is now an earnest subject, not a revolutionary one."[111]

In spite of these changes, arguments about choice and privacy have remained at the center of the debate. Hemlock's 1999 debate guidelines showcased a variety of arguments about choice. "No government or medical institution should decide on how we die," the guidelines stated. "Granting choices at the end of life is as important as at any other time of life."[112] After 2004,

Compassion and Choices often relied on similar arguments. As the organization's newsletter put it in 2005: "Choice and end of life care is a movement whose time has come."[113]

The same arguments came to the fore in 2014, when twenty-nine-year-old Brittany Maynard received a diagnosis of terminal brain cancer and chose assisted suicide under Oregon's law. The Death with Dignity National Center presented Maynard's case as a moving example of the importance of constitutional choice for all terminally ill patients. As the organization put it: "[A]ll people should have the right to control their own fate when facing death." Marilyn Golden, a policy analyst for DREDF, argued instead that Maynard's compelling story should not obscure the dangers of legalizing assisted suicide: "If assisted suicide is legal, some people's lives will be ended without their consent through mistakes and abuse."[114]

By crafting a constitutional strategy based on *Roe* and a related right of privacy, the right-to-die movement helped to create the debate defining the Maynard story. Starting with court decisions in the 1970s, litigators first used the *Roe* decision in challenging the constitutionality of state laws. By the 1980s, arguments based on a right to choose had spread. Activists did not always mention the Supreme Court decision by name, and many drew on popular interpretations of the decision, particularly those involving a right to choose. The right-to-die movement used these claims in service of reforms on everything from living wills to assisted suicide. In lobbying, the movement relied on these claims to court legislators and build alliances with left-leaning groups.

This vision of *Roe* and the right to privacy nevertheless went further than the one often associated with abortion and sex equality. Activists highlighted the importance of bodily integrity and pain avoidance but described the right to privacy in broader terms. In this analysis, the Constitution protected individuals' right to avoid the loss of dignity, identity, and independence that came with a prolonged illness.

Pro-lifers sought to exploit discomfort with the abortion procedure by drawing their own connections between the two issues. Disability-rights activists reiterated their view that while choice was valuable in the abstract, the right-to-die movement ignored the discrimination that drove some patients and the bias that led third parties to steer the sick and disabled toward choosing death. Pointing to the right to choose did nothing to settle a deeper

dispute about the preconditions for meaningful decisional autonomy at the end of life.

In court, the movement lost as much as it gained. Turning to *Roe* and the cases following it rooted activists' demands in precedent, convincing some lower courts. However, as the abortion wars escalated, the Supreme Court had no interest in issuing another broad constitutional decision.

Just the same, debate about *Roe* and the right to die revealed deep divisions about the idea of a right to choose. Did this freedom apply at the end of life as well as at the beginning? When did a decision reflect the desires and identity of an individual, and when did a choice stem only from coercion? Most important, did removing the state from decision making expand equality or undermine it? For several decades, debate about the right to die made these questions impossible to ignore.

6

Conscientious Objection, *Roe,* and the Role of the Judiciary

In the 1980s and 1990s, even the left-leaning activists who still found ways to reinvent *Roe* began to have second thoughts. Academic criticisms of *Roe* and of the right to privacy it announced had been searing from the start. Even commentators sympathetic to legal abortion wondered where the Court had found a right to abortion. Feminists took the justices to task for paying so much attention to doctors while ignoring women's stake in the matter. After the Supreme Court upheld bans on the public funding of abortion, feminist skepticism about *Roe* and the right to privacy intensified. But for many supporters of legal abortion, it was far too early to give up on either *Roe* or arguments related to it. These actors saw in the Court's decision material that could be woven into other arguments. Even outside of the abortion conflict, many activists felt the same. But in later decades, abortion foes and conservative politicians popularized an attack on the *Roe* Court's activism, suggesting that the justices' recognition of a right to privacy had been baseless. By the end of the 1990s, even those interested in invoking *Roe* or the right to privacy had reason to think again.

In the 1980s and 1990s, James Bopp Jr. took it as his mission to spread the word that *Roe v. Wade* violated the Constitution. As the general counsel of

the National Right to Life Committee (NRLC) since 1978, he oversaw efforts in 1981 to draft a constitutional abortion ban that would please divided pro-life activists. Soon, however, Bopp came to believe that real protection for a right to life might not come in his lifetime. It was much easier to imagine that the Supreme Court would rethink *Roe v. Wade*. He committed to popularizing arguments that *Roe* was not good law. Labeling the decision extreme and antidemocratic, he called on Americans to vote their conscience, selecting candidates who would get rid of *Roe*. In Bopp's view, pro-lifers would win only if they could make it an "article of faith" for the American public that *Roe v. Wade* stood for judicial tyranny rather than the right to privacy.[1]

Like Bopp, John Cavanaugh-O'Keefe found himself in the middle of a debate about whether *Roe v. Wade* was real law. Cavanaugh-O'Keefe came from a big Catholic family committed to fighting for the poor. His great-grandfather had attended strikes at a shoe factory in Lynn, Massachusetts, even though he belonged to the local elite and wore a silk top hat. When someone came to the door asking him to sign a fair-housing petition, Cavanaugh-O'Keefe's father asked if he could go with him to the next house. Cavanaugh-O'Keefe carried on the family tradition, plunging into antiwar activism after the death of his brother in Vietnam. He sympathized with the pro-life and women's movements, but he believed that the abortion issue boiled down to whom the law would protect—"who's human, who's in the family."[2]

After becoming involved with the pro-life movement, O'Keefe committed himself to nonviolent protest. The first pro-life sit-in took place in 1975, and in 1977, after a second, O'Keefe and his friends founded the Pro-Life Non-Violent Action Project. O'Keefe, a Harvard student, had a lot in common with the mostly liberal, well-educated students who traveled across the country to coach others in the most principled way to hold a sit-in. Inevitably, as they had always predicted, O'Keefe and his friends were arrested for violating trespassing laws.[3]

He and his colleagues argued a great deal about whether protestors should mount a defense in court. Some worried that fighting criminal charges was a distraction. But Burke Balch, a protestor on his way to law school, ultimately convinced his colleagues to put up a fight. Balch asserted that a necessity defense could open judges' eyes to the reality that *Roe* had never been good law. The idea, as Balch saw it, was that the *Roe* Court could never transform an illegal and unjust act into a constitutional right. As Cavanaugh-O'Keefe

explained in a pamphlet on the subject: "[T]he principles guiding the defense of innocent persons give first place to saving an innocent person's life."[4]

After the early 1980s, pro-lifers realized, as Cavanaugh-O'Keefe later explained, that "electing [Ronald] Reagan did not mean that *Roe* was going to go." At this time, direct-action protest caught the attention of a broader group of activists. New groups, including Operation Rescue and the Pro-Life Action League, dramatically expanded on the kind of clinic protest that O'Keefe had started. But Operation Rescue struck Cavanaugh-O'Keefe as an entirely different kind of organization. He remembers that when he urged those heading the group to read Gandhi and Martin Luther King, they responded that Gandhi was a pagan and that King was a philanderer. He saw that Operation Rescue leaders openly worked with those who supported bombing clinics and might not stop there. Increasingly, clinic blockaders debated how far they could go if *Roe* was an activist decision. Was it an act of conscience to take an abortion provider's life if *Roe* was not good law?[5]

In the mid-1980s, Republican operatives developed their own arguments tying *Roe* to judicial tyranny and conscience-based protest. Attacks on judicial activism were not new. Richard Nixon had invoked judicial restraint in promoting his vision for the courts, and in the mid-1970s, many scholars had called into question the soundness of the *Roe* decision's methodology. Feminist academics and grassroots protestors also criticized the Court's abortion jurisprudence. Some of these attacks centered on the flaws in the *Roe* decision, while others argued that the very idea of a right to privacy raised problems. Nevertheless, others tried to rehabilitate both *Roe* and the idea of a right to privacy.[6]

Ronald Reagan and his allies spread attacks on *Roe* far more broadly. Republican leaders set aside concerns held by left-leaning professors that the right to privacy could never do enough. Instead, Reagan and his colleagues argued that the *Roe* Court had done entirely too much, inventing a right to privacy and abusing judicial authority. These conservatives insisted that Americans committed to democracy could vote their conscience by selecting leaders who would rein in the judiciary and rid the country of *Roe*. This argument helped to cement an emerging alliance between pro-lifers and the conservative movement. For much of the 1970s, many abortion opponents saw their cause as the next front in the fight for civil rights, a battle that logi-

cally fit into the agenda of the political Left. In the early 1980s, pro-lifers cast their lot with Republicans because the conservative movement offered financial security, political relevance, and the best chance of passing a constitutional abortion ban. However, those who voted for Reagan had wildly different priorities. Blaming many of the cultural shifts to which his supporters objected on the Supreme Court, Reagan and his staff wanted to create a common target for those who supported him.[7]

Frustrated by the stalling of the constitutional-amendment campaign, mainstream pro-life organizations like Bopp's NRLC reframed their cause. To be sure, pro-lifers had believed that *Roe* was wrongly decided from the start. But for the most part, movement leaders faulted the Court for failing to protect the unborn child, not for making up a new right or applying an unprincipled judicial method. By the mid-1980s, the political advantages of arguments involving judicial activism had become obvious. Groups like NRLC and Americans United for Life (AUL) urged Americans with conscience-based objections to the Court's extremism to choose leaders who would undo *Roe*.[8]

Later in the 1980s, a diverse group of activists broke off from the mainstream and redefined conscience-based protest. Pro-life civil disobedience began early on, but since the 1970s, most protests had been small. By the late 1980s, groups like Operation Rescue launched much larger and better-publicized blockades. These protests spread a radically different definition of conscience-based protest and a different understanding of *Roe*. Whereas Republicans targeting *Roe* referred to the questionable constitutional foundations of the Court's decision, Operation Rescue activists often had in mind either the fact of legal abortion or the denial of fetal personhood. Nevertheless, members of the group agreed that *Roe* was a lawless decision. If the 1973 decision had no merit, these advocates claimed a moral and legal obligation to reject *Roe* and to break some of the laws supporting it.[9]

Rather than focusing on the scope of privacy rights, this new dialogue made *Roe* a part of discussions about the role of the judiciary and the nature of conscience-based protest. The blockade movement convinced some religious conservatives and political leaders that conscientious objections to the *Roe* decision excused some violations of the law. Given the new visibility of claims involving the Court's activism, some saw civil disobedience as a legitimate last resort. However, when blockaders brought these claims to court,

their effort unraveled. Rescuers identified what was called a necessity defense as a vehicle for their ideas of conscience, arguing that blockaders broke the law in order to avert the greater evil authorized by the *Roe* decision. As a formal legal matter, this strategy had obvious flaws, and every appellate court to decide the issue rejected the application of the necessity defense. Failure in court hardened the rescue movement, radicalizing many of its remaining members. Starting in 1993, a spate of killings of abortion providers further delegitimized arguments that *Roe* and laws associated with it did not deserve obedience.[10]

After the decline of the blockade movement, the idea that *Roe* could not be separated from the issue of judicial activism lived on. Even if clinic blockaders had lost credibility, the *Roe* decision had become a flashpoint for battles about the role of the judiciary in American democracy. Even the leaders of abortion-rights groups who most often used privacy claims began to question the usefulness of anything related to the *Roe* decision. This transition was neither smooth nor complete. Well after the 1990s, some activists, like those in the right-to-die movement, continued offering their own innovative understandings of *Roe.* Even more often, activists tied their causes to ideas often linked to *Roe,* including a right to choose. Just the same, relying on *Roe* or the right to privacy carried new costs. By the early 1990s, few wanted their cause identified with an antidemocratic judiciary.

A Symbol of Judicial Tyranny

From the time of the nation's founding, judges, commentators, and academics struggled to reconcile judicial review—the idea that the courts had the final word on the meaning of the Constitution—with the values animating democracy. The problem, as Professor John Hart Ely explained in 1980, was that "a body that is not elected or otherwise politically responsible in any significant way is telling people's elected representatives that they cannot govern as they'd like."[11]

In the second half of the twentieth century, the controversy surrounding judicial review spilled over into public debate. After 1954, when the Supreme Court decided *Brown v. Board of Education,* segregationists joined some commentators in accusing the justices of making policy rather than interpreting

the law. In the 1960s, in the aftermath of Warren Court decisions on school prayer and criminal procedure, conservatives joined President Richard Nixon in attacking the Supreme Court.[12]

But throughout the 1970s, pro-lifers took little interest in judicial-activism claims. Even before 1973, movement members prioritized what they saw as the unborn child's rights to life and equal treatment. AUL articulated a common view that the movement's mission was to "impress upon all the dignity and worth of each individual life." *Roe* dismayed those who primarily faulted the Court, in the words of movement member Robert Destro, for "rejecting the egalitarian tradition embodied in the Declaration of Independence and the Fourteenth Amendment." In the decade after 1973, pro-lifers focused almost exclusively on a constitutional amendment that would create a right to life. Indeed, in 1974, when Congress first considered an amendment centered on overruling *Roe* and criticizing the Court's activism, movement leaders almost universally opposed it. Pro-lifers rejected such a strategy because many believed that an amendment that said nothing about the unborn child's right to life was as bad as *Roe* itself. As NRLC argued in the period, focusing on judicial activism "would not effectuate a rejection [of *Roe*] but would rather reaffirm the Court's decision."[13]

Feminist commentators and left-leaning academics sometimes spent more time than pro-lifers discussing the jurisprudential foundations of *Roe*. Some worried that unless sympathetic scholars rehabilitated the Court's reasoning, it would be too easy to discredit the idea of a constitutional abortion right. Feminist commentators also went after the Court for assigning the abortion right partly to doctors. Outside the academy, members of the women's health movement and feminists of color feared that *Roe* stemmed from calls to curb population growth. "When the Supreme Court made the decision to reform the laws on abortion legislation, there were cries of thanks from many in the women's movement," explained one activist. "But we must remember that the laws have not been changed for our benefit but so the government can control the population."[14]

Other activists saw greater potential in reinventing *Roe* and a related right to privacy. The National Organization for Women (NOW) put out a timeline claiming that *Roe* had recognized "the constitutional right to abortion based on the rights to equal protection and to privacy." Leaders of the

National Abortion Rights Action League (NARAL) similarly stressed that *Roe* had protected "the rights of the individual to lead his or her life, free from the dogma and dictates of others."[15]

By the early 1980s, after the Supreme Court upheld bans on the use of state and federal dollars for abortion, feminist scholars expressed even more uncertainty about *Roe* and the right to privacy. In 1976, Congress passed the Hyde Amendment, a ban on the use of Medicaid dollars for abortion. Four years later, in *Harris v. McRae*, the Court upheld the amendment, reasoning that "[a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice . . . , it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom."[16]

Following *McRae*, some feminist scholars concluded that the right to privacy would never be enough to protect meaningful liberty for women. Scholar Sylvia Law wrote that because the *Roe* "Court recognized a privacy-based right of reproductive freedom," commentators had been "virtually blinded to the relevance of equality notions when evaluating state limitations on a woman's access to abortion." Catharine MacKinnon argued that *Roe* used "the legal right to privacy as a means of subordinating women's collective needs to the imperative of male supremacy." Ruth Bader Ginsburg suggested that the backlash to *Roe* could be traced partly to the Court's reliance on a right to privacy.[17]

Criticisms of *Roe* reached back to 1973, and many sympathetic to the idea of legal abortion saw serious problems with the original opinion. Nevertheless, concern about the soundness of the Court's reasoning did not always reach far outside the academy. During the 1980 campaign, Reagan and his colleagues tried to capitalize politically on the *Roe* Court's supposed activism and the perceived flimsiness of a related right to privacy. In the 1980 presidential campaign, when Reagan worked to convince pro-lifers that judicial activism was the real problem, the movement had several reasons to align with conservatives. Reagan was the first to run on a platform explicitly endorsing an antiabortion constitutional amendment, leaving the Republican Party as the only logical choice for single-issue voters. At the same time, the emergence of the Religious Right and New Right promised resources and political influence to struggling pro-life groups.[18]

Although pro-life organizations endorsed Reagan in 1980, Republicans recognized that their new coalition was fragile. Though affluent, white Protestants remained the Republican Party's core supporters, Reagan courted southern whites, conservative evangelical Protestants, Sunbelt suburbanites, and blue-collar Catholics. Each of these groups took issue with the Supreme Court, but their priorities differed considerably. Reagan used disaffection with the judiciary to frame a widely varied set of arguments as a single, principled conscientious objection to judicial activism.[19]

Reagan drew on decades of debate about conscientious objection. Religious resisters had requested exemptions in both world wars. Pro-lifers had developed their own conscience claims almost immediately after the Court decided *Roe*. In 1973, Richard Nixon signed into law the Health Programs Extension Act. The act included an amendment allowing medical professionals and hospitals receiving federal funding to refuse to perform sterilizations or abortions for religious or moral reasons. Senator James Buckley (Conservative-NY), one of the strongest allies of the pro-life movement, insisted that the government had a duty to protect those with conscience-based objections to any act of violence. "[T]his is a Nation which has always been concerned with the right of conscience," he explained. "It is the right of conscience which the Supreme Court has quite properly expanded not only to embrace those young men who, because of the tenets of a particular faith, believe they cannot kill another man, but also those who because of their own deepest moral convictions are so persuaded."[20]

Buckley's arguments reflected then-conventional ideas within the pro-life movement about conscience. Movement leaders had focused on statutory exemptions from otherwise-applicable legal obligations. In this view, the courts, the executive branch, and Congress ultimately determined who could claim such an exemption and what "the right of conscience" involved. Reagan's arguments about judicial activism framed conscience in a different way. While pro-lifers had always drawn a connection to the violence some saw in performing abortions, Reagan and his allies suggested that simply voting the wrong way could make someone complicit in the death of unborn children. Just as important, Reagan positioned conscience not merely as something that required formal recognition by a court or legislature but also as a reason for choosing one political candidate over another.

On the campaign trail, Reagan elaborated on this theme. He presented a vote for his party as an act of conscience that would put a stop to "an abuse of power as bad as the transgressions of Watergate." Reagan contrasted his approach to judging with the one favored by the Warren and Burger Courts that had chosen to "override popular opinion." Reagan vowed to select judges who "respect and reflect the values and morals of the American majority."[21]

In the summer of 1981, when Reagan announced Sandra Day O'Connor's nomination to the Supreme Court, the administration had new reason to identify the *Roe* decision with judicial activism. Within the pro-life movement, rumors spread that during her time as a state legislator, O'Connor had favored legal abortion. In July, when Reagan officially made his selection, reporters immediately pointed to the opposition of many pro-life and Religious Right groups to the O'Connor nomination. Reagan struggled to strike the right balance in responding. At first, he stated that he was completely "satisfied" with O'Connor's position on abortion. William French Smith, then Reagan's attorney general, immediately cut in, reminding reporters that Reagan had "not made a single-issue determination." Smith steered the conversation back to O'Connor's judicial philosophy, reiterating that she believed that "the function of the law [was] to interpret and apply the law, not to make it."[22]

White House officials understood that Reagan could not publicly assuage the concerns of grassroots activists about O'Connor's commitment to the pro-life cause. Instead, the administration began a series of closed-door meetings to reassure social conservatives. Administration officials also discussed how to avoid a similar uproar when filling the next Supreme Court vacancy. Staffer Michael Uhlmann proposed that Reagan select only those who "saw *Roe v. Wade* and its progeny as most unwise assertions of judicial power." The problem with O'Connor began when she appeared "'soft' on both abortion and judicial hegemony over the subject." Making *Roe* a symbol of judicial activism could smooth over tensions with pro-life leaders while maintaining Reagan's public position on judicial restraint.[23]

By 1983, abortion opponents—many of whom had not yet fully adopted the rhetoric of judicial restraint—found their own reasons to make *Roe* a symbol of judicial activism. In June, in *City of Akron v. Akron Center for Reproductive Health* (*Akron I*), the Supreme Court struck down an antiabortion ordinance by a vote of 6-3. To the surprise of the pro-life movement, Sandra

Day O'Connor wrote a dissent attacking the core premises of the *Roe* decision. She expressed particular skepticism about the *Roe* Court's reliance on the idea of viability: "As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception."[24]

Within a month of the decision of *Akron I*, a last-ditch attempt to secure an antiabortion constitutional amendment failed. The so-called Hatch-Eagleton Amendment declared that the Constitution recognized no right to abortion. If passed, the proposed amendment would have allowed the states and Congress to regulate or even ban the procedure. With pro-lifers intensely divided about the proposal, in July 1983, it failed in the Senate by a vote of 49-50-1.[25]

O'Connor's reasoning in *Akron I* strengthened the resolve of antiabortion attorneys who believed that the movement could make the most progress in the courts. As AUL education director Steven Baer reported, the leaders of the organization discussed how to respond to "Justice O'Connor's encouraging dissent." Pro-lifers hoped that *Akron I* would start a new chapter in pro-life strategy: a campaign "to unite the movement around the relatively uncontroversial proposition that the Court should reverse itself."[26]

To kick off its new campaign, AUL scheduled a national conference on "reversing *Roe* in the courts."[27] Those present recognized that a change in tactics would also require a different message: rather than just demanding rights for the unborn, pro-lifers would sell the public on expressing conscience-based objections to judicial overreaching. As Steven Valentine of AUL explained: "[T]he Court is not a legislature. When it acted as if it were, it committed an abuse of power." NRLC repeatedly chastised the Court for its "extremism on the abortion issue" and asked concerned voters to take back their right to self-rule. At AUL's strategy conference, those present agreed that "laws showing just how radical *Roe v. Wade* is must be passed." In this way, the movement could better appeal to the conscience of voters and "make reversal more likely."[28]

By the mid-1980s, both Republican leaders and abortion opponents emphasized the activism of the *Roe* Court, urging voters who believed in democracy to prove it at the polls. Commentators had questioned the reasoning of *Roe* from the very start, but in the 1980s, conservatives put complaints about the Court's activism before a much bigger audience. The Supreme Court's

next abortion case reinforced pro-life interest in this strategy. In *Thornburgh v. American College of Obstetricians and Gynecologists*, a narrow 5-4 majority voted to strike down the Pennsylvania Abortion Control Act. A year later, when Justice Lewis F. Powell retired from the Supreme Court, John Willke of NRLC described legal and social change as straightforward. "Abortion came to us through the law," Willke wrote his colleagues. "Lawmakers make laws. Lawmakers appoint judges. We elect lawmakers. Someday we will again forbid abortion by changing the law."[29]

The Bork Nomination and the Role of the Courts

It was only during the 1987 confirmation hearing of Robert Bork that the issue of judicial philosophy became a political preoccupation. After his nomination to the Supreme Court failed, movement conservatives saw Bork as a martyr for the cause of judicial restraint. In the wake of Bork's nomination, membership in organizations like the Federalist Society spiked, but the nomination also had an explosive effect on grassroots activists. Bork had long been one of *Roe*'s most vocal critics, and throughout the nomination process, he made it gospel for many activists that *Roe* and judicial activism could not be separated from each other. Bork's defeat prompted conservative activists to reconsider what would be needed to change the judiciary. What did judicial activism mean, and if the courts abused their power, how should citizens express their objections?[30]

From the outset, the Reagan administration presented the nomination as a referendum on the need for judicial restraint. White House talking points issued in late July 1987 argued: "The issue is whether the judges and courts are called upon by the Constitution to interpret the laws passed by Congress and the states—'the judicial restraint view'—or whether judges and the courts should instead write orders and opinions which are, in effect, new laws—'the activist view.'" Because of the possible significance of the Bork nomination, over thirty-five progressive groups, forming the Block Bork Coalition, met to counter Reagan's framing of the discussion even before the White House made its formal announcement.[31]

In September, when Bork's nomination hearings began before a Senate Judiciary Committee panel, the tactics of the Block Bork Coalition appeared

to have hit their mark. Senator Arlen Specter (R-PA), whose vote was key, expressed concern that Bork's views on judicial restraint would not allow for enough flexibility to "meet the needs of the nation," particularly in the context of civil rights and privacy. In early October, the panel voted 9-5 against Bork. Bork called for and received a full vote from the Senate, but several weeks later, the Senate rejected the nomination by a vote of 58-42.[32]

In the lead-up to the hearings, both conservative organizations and the White House had highlighted the outcomes on issues from criminal justice to gay rights that conservatives could expect if Bork made it to the Court. In defeat, however, he became a symbol of the excesses of a liberal judiciary. After stepping down from the DC Circuit, Bork himself helped to voice this view. In a widely circulated letter to Reagan, Bork insisted: "You nominated me to my present court and to the Supreme Court precisely because I do speak for the traditional view of the role of the judge under the Constitution."[33]

Although he never took a place on the Supreme Court, Bork's criticisms of *Roe* restarted scholarly debate about *Roe*'s privacy reasoning. Some commentators, like Anita Allen, tried to reframe the right to privacy, arguing that *Roe* was best understood as a decision about personal autonomy rather than freedom from the government. Others, like Ruth Bader Ginsburg, invested more in alternative justifications for abortion rights based on sex equality. But many grassroots activists continued putting *Roe* and a related right to choose at the center of their rhetorical agendas. Although many feminist activists believed that the Court's 1973 decision had not gone far enough, it was not until later that most activists believed that related arguments had become a political liability.[34]

Bork's defeat had a quite different effect on the pro-life movement, forcing some to reconsider how they could express their conscience-based objections to *Roe*. Reagan and NRLC leaders had insisted that those who could not stand the activism of the courts could object at the polls, but this strategy had not gone anywhere. Those who had voted their conscience by selecting Reagan saw Bork's nomination go down in flames. If the *Roe* decision was not good law, what could be done next?

The Blockade Movement

In the late 1980s, a very different idea of conscience-based objection to *Roe* took hold. The rescue movement, an effort defined by clinic blockades, went beyond efforts to create exemptions for those with religious or moral objections. And clinic blockaders did not simply view conscience as a reason to vote a certain way. The blockade movement instead argued that those with conscience-based objections could decide for themselves what the law meant, and if necessary, commit criminal acts in the name of their beliefs.

Clinic blockades transformed a diverse group of activists into outlaws. Scholars of the rescue movement have pointed out the influence of conservative evangelical Protestantism on the rise of Operation Rescue, and many leaders of the movement saw blockades as a religious obligation. Rescuer Flip Benham was one of them. Raised in a family of saloon keepers, Benham recalls thinking that *Roe v. Wade* was a "great thing"—liberating for sexually active men and women not yet ready for marriage. A self-described alcoholic by the age of eighteen, Benham found God less than a decade after the *Roe* decision. He quit drinking, got out of the saloon business, went to seminary, and founded a Free Methodist Church on the outskirts of Dallas, Texas. Even as a pastor, Benham did not view abortion as "a major issue." However, in 1982, another minister presented him with what he saw as Scriptural evidence that life began at conception—that the Word of God became flesh before Jesus was born.[35]

When he first took an interest in the pro-life movement, Benham mostly stayed out of the limelight. His life changed again in 1988 when he turned on the television and saw Operation Rescue staging a clinic blockade. After driving to Atlanta to see an event for himself, he founded a chapter of the organization in the Dallas metroplex and later became a leader of Operation Rescue National. Like many in the rescue movement, Benham faced a variety of criminal charges and civil suits. And like so many of his colleagues, he viewed his problems as the result of a lawless system that began with the Supreme Court's decision in *Roe*. As Benham would still put it years later: "you are justified in breaking a lesser law to follow a higher law."[36]

Benham resembles the protestors who made the rescue movement famous, but for some time, blockades appealed to a broader cross section of abortion opponents. Juli Loesch Wiley, who saw antiabortion politics quite

differently than Benham did, also helped to map the future of the rescue movement. She first became politically active in 1966, working to register African American voters in Erie, Pennsylvania. A year later, she made posters for the city's first antiwar protest. After a stint with the United Farm Workers from 1969 to 1970, Wiley became more heavily involved in protesting war, violence, and nuclear arms, but she did not initially connect abortion to her commitment to nonviolence.[37]

As a young woman, she saw abortion regulations as an effort by male legislators to oppress women—the work of sexists who were "snake mean and turkey stupid." But because she wanted to draw pro-lifers into the antinuclear movement, Loesch Wiley began attending antiabortion events anyway. She remained uncommitted until attending a convention held by NRLC in 1978, where she heard a speech made by John Cavanaugh-O'Keefe. Left-leaning, pacifist, and feminist, Cavanaugh-O'Keefe entirely "won [her] heart."[38]

A decade later, Loesch Wiley took a position as a media coordinator for Operation Rescue. Like Benham, Loesch Wiley would be arrested more than a dozen times, but she believed that she had never violated any law that really mattered. Viewing *Roe* as a "legal monstrosity," she saw her actions as legally necessary, the rescue of "persons in imminent danger of injury and death."[39]

In a period in which pro-life leaders insisted that *Roe* had no legal foundation, activists like Benham and Loesch Wiley saw this claim as a call to action. By protesting in the streets, breaking the law, and defending themselves in court, rescuers called into question the meaning of judicial tyranny and the limits of conscientious objection.

Of course, pro-life civil disobedience did not start in the late 1980s. Clinic protests were common immediately after *Roe* and in some states, even before the decision came down. From the beginning, those involved in clinic protests reflected the diversity of the larger pro-life movement. But the early clinic protest movement was small, local, and struggling in the face of hostility from most courts. For example, when most nearby clinics had obtained judicial injunctions against further protests, John Ryan went by himself to block the entrance to a clinic in Bridgeton, Missouri, feeling so alone that he sometimes prayed that the bus taking him to the clinic would break down. But in the mid-1980s, interest in direct action intensified. In 1987, at a conference on direct action antiabortion protest hosted by veteran protestor Joseph

Scheidler, activist Randall Terry explored the possibility of nationalizing direct action. Before the end of the year, Terry's group, Operation Rescue, had mounted its first blockade in Cherry Hill, New Jersey.[40]

The rescue movement of the late 1980s inspired activists because it promised so much to different constituencies. Many of the leaders and rank-and-file members of the movement got their start in local churches rather than in the organized antiabortion movement, and to a greater extent than many veteran activists, blockaders viewed abortion as a gospel issue. Framing antiabortion as an explicitly religious, Christian act was liberating for some blockaders, many of whom had not previously been politically active. As Keith Tucci of Operation Rescue explained years later, many in the movement sought out "a spiritual awakening that would cause people to put their faith in action."[41]

But not all blockaders shared the same views of the Bible, and the rescue movement appealed to some, including Catholics and other nonevangelical Christians, who had given up on leading pro-life strategies. After Reagan's two terms in office, pro-lifers were no closer to passing an antiabortion constitutional amendment, and Congress had blocked Bork's nomination to the Court. Operation Rescue's publicity materials tapped into the growing belief that lobbying and education had "got [the antiabortion movement] virtually nowhere." At the same time, groups like AUL and NRLC popularized arguments about what they saw as the tyranny and extremism of *Roe*, stoking the resentment of those who believed that the movement had stalled.[42]

Clinic blockades also appealed to abortion opponents caught up in the excitement of media coverage, mass protests, and countless arrests. Activists felt that by participating in a rescue they could make an immediate difference without the organizational commitment, membership dues, or bureaucracy some associated with the organized pro-life movement. In the late 1980s, the movement made room for people who saw law-breaking both as a means to an end and as the start of a broader effort to take back power from the courts.[43]

The Boundaries of Conscience-Based Objections

When Operation Rescue launched blockades at three Atlanta clinics in the summer of 1988, over 1,200 protestors trespassed on clinic property, obstructed entrances, and faced arrest. The resulting public debate pushed

leaders of Operation Rescue to elaborate on when conscience-based objections could justify law-breaking. Republican leaders and mainstream pro-life organizations had urged Americans to vote their conscience by picking candidates who would reject *Roe*. Blockaders defined conscientious objection in different terms. Because they saw *Roe* as unconstitutional and ungodly, Operation Rescue members claimed the authority to break the law.[44]

In Atlanta and Los Angeles, rescuers initially justified their actions by claiming to follow in the tradition of civil disobedience established by the civil-rights movement. Comparing their treatment to the victimization of peaceful civil-rights protestors, rescuers repeated accusations of police brutality. ChristyAnne Collins, a blockade leader, labeled her colleagues "civil rights advocates." Representative Clyde Holloway (R-LA) elaborated further: "We believe the plight of these protestors is very similar to that of Black Americans during the civil rights movement."[45]

Feminists and prominent civil-rights leaders rejected the comparison of the blockade and civil-rights movements out of hand, presenting *Roe* not as an example of judicial tyranny but as the source of a valid right to constitutional privacy. In 1989, at a Planned Parenthood event, thirteen civil-rights leaders stated that the blockaders flouted the Constitution and ignored the right to privacy. They contended that while civil-rights leaders had understood the real meaning of equal protection, Operation Rescue wanted "the Constitution rewritten . . . to deny Americans their constitutional right to freedom of choice."[46]

Blockaders responded that law-breaking was a legitimate exercise of conscience. Refusing to acknowledge that blockaders violated the law, Charles Rice, a professor at Notre Dame Law School and an early supporter of the blockades, explained: "*Roe v. Wade,* which defined the unborn child as a nonperson subject to execution at the discretion of others, is an unjust law and therefore void." The leadership of Operation Rescue also described their law-breaking as an act of conscience—an assertion that *Roe* was not the law at all. In a 1988 pamphlet, the organization argued: "No Supreme Court decision can nullify God's law, or our duty to obey it." The organization also developed secular explanations for its rejection of *Roe v. Wade*. "Even the laws of men acknowledge that at certain times, people may break certain laws to avoid a greater evil," another pamphlet explained. "We are simply being good, moral citizens by avoiding the greater evil of aborting children." "We

are not lawbreakers," one blockader told the media. "But we feel that our Constitution is based on God's law which asks us to save the most helpless."[47]

At the height of the Operation Rescue blockades, debate about the legitimacy of the *Roe* decision and conscientious objection to it unfolded mostly in the media. Later, when facing criminal charges, protestors tried their ideas about conscience and legal interpretation before the courts. At first, Randall Terry and his allies celebrated the opportunity. As media spectacles, the trials would allow Operation Rescue to draw more attention to the problems with *Roe* and the justice of the organization's cause. If juries and judges sided with blockaders, Operation Rescue could earn publicity and set the stage for a more formal challenge to legal abortion.

Over time, the rescue trials exposed the weaknesses of the strategy Operation Rescue pursued. Nevertheless, the identification of *Roe* with judicial activism outlasted the rescue movement's influence. While voters and the courts eventually rejected rescuers' justifications for law-breaking, many believed that *Roe* embodied what was wrong with the courts.

Blockaders Go to Court

In the first trials to come out of the Atlanta and Los Angeles blockades, Operation Rescue promoted a far-reaching idea of conscientious objection. The group used a necessity defense to argue that the blockades were legal. The defense required plaintiffs to prove four elements: (1) that a protestor was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relation between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law. Necessity had long been a preferred weapon for antiabortion picketers, but Operation Rescue put it to new use. Members of the group claimed that if Republican leaders and mainstream pro-life organizers had proven that the 1973 decision really was unprincipled, no one had a moral or legal obligation to obey it.[48]

In August 1989, in a Los Angeles courtroom, Terry and four co-defendants asked the court to entertain a necessity defense of this kind. Most of the blockaders represented themselves, and Cyrus Zal, a flamboyant pro-life lawyer, acted as counsel for two of Terry's colleagues. All five claimed to have stopped some women from pursuing abortion by preventing them

from entering a clinic. The centerpiece of the defense, however, was a claim that *Roe v. Wade* was not good law. Judge Richard Paez quickly ruled against the use of the defense, reasoning that there was "no way [to show] that abortions were stopped that day." Paez concluded that even if rescuers could prove that they stopped abortions, abortion did not constitute an "evil." Judges, not blockaders, had the final word on its legality.[49]

Counsel for Terry and his co-defendants still managed to make conscientious objection a central issue. Judge Paez censured Zal for asking jurors and witnesses whether they believed in God. In polling potential jurors and questioning witnesses, Zal and Terry cited conscience in justifying their use of words that the court considered inflammatory. When one prosecutor objected to the incendiary language used by Terry and his allies, one of Terry's co-defendants labeled her an "anti-Christian bigot." Asked to present his case in more neutral terms, Terry claimed that such a request rose to the level of a "violation of [his] First Amendment rights."[50]

Rescuers' arguments about conscience had mixed results. Paez viewed Zal's rhetoric as an unjust attempt to "sway the jury" and handed him a 290-day contempt-of-court sentence. By contrast, in September 1989, a Los Angeles jury acquitted Terry and his co-defendants of twenty-four of the misdemeanor charges they faced and failed to reach a decision on the others. Jurors found video evidence of supposed police brutality impressive, making a stronger case for the connection between blockaders and civil-rights protestors. Other jurors seemed to accept that by acting for reasons of conscience blockaders had acted properly. One mentioned that the necessity defense had been an "underlying theme" in deliberations.[51]

But after the Los Angeles trial, any effort to litigate the boundaries of civil disobedience in the courtroom backfired. Terry was convicted of trespassing charges the next time he put his theory of conscience-based law-breaking before a jury. Federal judges held Operation Rescue members in contempt for violating injunctions. Indeed, some judges reiterated that protestors could not legitimately claim the mantle of the civil-rights movement without willingly accepting punishment. In a 1989 contempt order, United States District Judge A. Wallace Tashima explained that "[t]he essence of civil disobedience is to allow yourself to be punished . . . because you have allegiance to a higher authority." By seeking to win in court and claim the moral high ground, rescuers made themselves "nothing more than ordinary lawbreakers."[52]

The drawbacks of blockaders' idea of conscience came most clearly into relief in the striking failure of the necessity defense. On legal grounds, the defense had unavoidable flaws. Since the courts viewed Supreme Court precedent as binding, protestors struggled to establish that they had chosen the "lesser evil." While some judges, even those on the Supreme Court, believed that *Roe* should be overruled, no one accepted that protestors could decide for themselves to reject it. On some occasions, blockaders narrowed their defense, arguing that rescues interrupted abortions after fetal viability—procedures that could be outlawed after *Roe*. In practice, however, most courts recognized that blockaders used the necessity defense to protest abortion at any point in pregnancy. As the Kansas Supreme Court explained in 1993: "To allow the personal, ethical, moral, or religious beliefs of a person . . . as a justification for criminal activity . . . would not only lead to chaos but would be tantamount to sanctioning anarchy."[53]

When blockaders asked the courts to sign off on civil disobedience, the mainstream antiabortion movement also closed ranks, distinguishing lawful protest from blockaders' criminal activity. Starting in the late 1980s, the blockade movement had been an uncomfortable reality for organizations like AUL and NRLC. Some members of these groups had gravitated to clinic blockades, and movement attorneys sometimes defended protestors facing criminal charges. Nevertheless, by putting the movement's radicals front and center, Operation Rescue made it harder for pro-life lobbyists and litigators to make headway. If their members participated in or endorsed blockades, mainstream organizations like AUL or NRLC also faced the threat of legal liability. Writing in the early 1990s, AUL leader Guy Condon maintained: "We need to exhaust every legitimate means to protect the unborn before resorting to civil disobedience."[54]

Rescuers' failed use of the necessity defense changed popular debate about conscientious objection. First, by bringing their ideas about conscience-based law-breaking before the courts, blockaders engaged both judges and mainstream abortion opponents in dialogue about the limits of civil disobedience. Arguments about conscientious resistance had persuaded some in the political arena, but in court, the same ideas failed spectacularly. Even judges sympathetic to the antiabortion movement insisted that the judiciary alone determined when abortion rose to the level of a legally cognizable harm.

The failure of the necessity defense further radicalized the rescue movement and led to its later loss of influence. With progress seemingly impossible in the courts, the leaders of Operation Rescue turned inward. In 1989, with the backing of Jane Bray, Joseph Foreman, and others in his inner circle, Terry chose jail time over paying a court-ordered fine, but his woes were just the beginning of Operation Rescue's troubles. Citing the pressure created by civil lawsuits, the group officially closed shop in January 1990, re-forming as Operation Rescue National. Keith Tucci replaced Terry as the organization's leader, but Joseph Foreman and other absolutists in the group seized the chance to advance a different vision of law. Some in the blockade movement had always believed that violence against providers could be justified under certain circumstances. But for the most part, Terry and some of his allies had publicly described law-breaking as a way to sway the courts and gain the upper hand in the tumult of democratic politics. Foreman, Bray, and other leaders of the movement believed that persuasion had already failed. These activists argued that rather than swaying tyrannical judges and corrupt politicians, rescuers had to take matters into their own hands. While Operation Rescue had always framed its cause as a matter of faith, the new leadership also put religion even more front and center, further alienating potential allies and empowering a core of the most uncompromising activists.[55]

With the gradual radicalization of part of the rescue movement, feminists took the offensive. Attorneys working with the women's movement did not settle for an attack on the extreme wing of the pro-life movement. Instead, in litigating *Bray v. Alexandria Women's Health Clinic*, they used public discomfort with clinic blockades to question the motives of anyone who opposed abortion. While they fell short in the courts, feminists helped to chip away at the credibility of rescuers. Although *Roe* became synonymous with questions of judicial overreaching for many, the blockade movement still seemed to have gone too far.

Bray and Legitimate Protest

In responding to clinic blockades, NOW and other feminist groups put their own spin on an equality approach to abortion. Because Operation Rescue linked its cause both to evangelical Protestantism and to antifeminist activism,

blockaders quickly became a target of feminist efforts to expose sexism in the pro-life movement. However, the strategy at work in *Bray* promised to do much more—unmask the opposition, ensure access to abortion, and establish once and for all that abortion was a question of equality.[56]

The *Bray* litigation began after Operation Rescue announced planned protests in Washington, DC, in the fall of 1989. In November, the NOW Legal Defense and Education Fund filed a complaint and sought to enjoin the protests. The question in the case was whether the planned blockade counted as an illegal conspiracy under federal law. After granting NOW a temporary restraining order, the District Court for the Eastern District of Virginia heard evidence on what rescues involved. Quickly, however, the central issue became whether blockades fell under the Civil Rights Act of 1871 in the first place.[57]

On its face, the act required petitioners to prove that blockaders had entered into a conspiracy, intended to deprive others of civil rights, acted in furtherance of this objective, and caused injury. NOW could easily establish a conspiracy, since leaders formally organized blockades. The case turned on a final element, which was added to the Supreme Court's analysis to narrow the reach of the act. Feminists would have a cause of action only if the conspiracies they challenged reflected "class-based animus." Most courts to consider the issue agreed that the act outlawed sex-based animus, but a difficult question remained: Did clinic blockades reflect hostility toward women?[58]

On appeal to the Fourth Circuit Court of Appeals, Operation Rescue insisted blockades at most affected only women seeking an abortion. Although only women could get pregnant, not all of them chose abortion, and women participated in blockades. Moreover, counsel insisted that protestors kept everyone out of abortion clinics, regardless of sex.[59]

NOW questioned the logic of the blockaders' claim. Attorneys for the group suggested that targeting only women exercising a right did not excuse otherwise criminal conspiracies. This was enough to persuade the Fourth Circuit, which ruled in NOW's favor in the fall of 1990. When the Supreme Court granted certiorari to hear *Bray* in February of 1991, pro-lifers uncomfortable with the rescue movement came to its defense. Feminists' strategy in *Bray* treated sexism and opposition to abortion as one and the same. The stakes of such a claim were higher than ever before. From the 1970s onward, pro-lifers had claimed that abortion injured women, physically and psycho-

logically. In the late 1980s and early 1990s, pro-lifers put more emphasis on these claims, and recent Supreme Court decisions had only reinforced interest in woman-centered strategies. In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court declined an invitation to overrule *Roe* but upheld several parts of the disputed law, including one involving informed consent. AUL and NRLC members viewed *Casey* as inspiration for strategies that focused on informed consent—or, as abortion opponents put it, "women's right to know." "We must help people understand that abortion hurts women too," AUL leader Paige Cunningham told her colleagues.[60]

Because feminist attorneys had implicitly indicted all abortion opponents, *Bray* helped broker a temporary truce between the pro-life mainstream and the blockade movement. For some time, AUL had defended clinic picketers, including those engaging in protests that the organization viewed as counterproductive. Nevertheless, AUL leaders worried that an adverse precedent would put an end to all pro-life clinic protests, not just the blockades with which mainstream organizations took issue. In an amicus brief submitted on behalf of Feminists for Life, AUL attorneys denied any relationship between sex discrimination and pro-life politics. As the brief framed it, *Bray* invited the Court to unnecessarily take sides in the moral debate about abortion, weighing "different conclusions on whether abortion is necessary for social and political emancipation of women, and whether opposition to abortion is, per se, discrimination."[61]

Although the Bush administration had called for an end to blockades, President George H. W. Bush and the Justice Department sided with Operation Rescue during the *Bray* litigation. Deputy Solicitor General John Roberts, the future chief justice of the Supreme Court, vigorously refuted any connection between sex discrimination and pro-life politics. Roberts stated that protestors were "perfectly non-discriminatory in their opposition to abortion." As the Justice Department recognized, *Bray* could be a referendum on the entire antiabortion movement.[62]

By framing antiabortion blockades as sex discrimination, feminist litigators inadvertently encouraged mainstream groups and blockaders to declare a ceasefire. At the same time, the *Bray* litigation threw into relief the changing identity of the rescue movement. In 1991, Operation Rescue National seemed ready to show its strength, spearheading blockades in Boston and announcing a Summer of Mercy in Wichita that would, among other things,

target Dr. George Tiller's clinic, one of the few in the region that performed late-term abortions. Some counted the Summer of Mercy as a success. More than 2,500 protestors were arrested, creating the kind of media frenzy familiar from earlier blockades.[63]

Just the same, Operation Rescue National increasingly offered a vision of conscientious objection that alienated many potential supporters. Tucci and others defined a much broader category of evils that rescuers sought to uproot, including gay rights and secularism. While some Operation Rescue leaders had long defined their cause as a religious one, the organization more aggressively addressed issues beyond abortion. In 1991, an Operation Rescue National pamphlet contended: "The pro-abortion faction is also comprised of many homosexuals. These people have no stake in reproductive issues, but their agenda is the same. They are out to destroy Christianity." Operation Rescue National spokespersons condemned Anita Hill for accusing Clarence Thomas of sexual harassment and labeled the women's movement "satanic." The group left less room for pro-lifers uncomfortable with either evangelical doctrine or Republican politics.[64]

Second, Operation Rescue National practiced a form of civil disobedience that differed considerably from the nonviolent public displays that had swayed some in Atlanta and Los Angeles. There, rescuers had convinced some observers that the police had brutalized innocent protestors. However, by the early 1990s, Operation Rescue National faced an ever-more-complex network of injunctions, fines, and statutory restrictions. Feminist groups provided free assistance to women entering clinics, making it much harder for blockaders to actually close down facilities. Instead of putting on dramatic public displays, Operation Rescue National began prioritizing efforts to "expose" and "humiliate" abortion providers. Tucci oversaw training sessions on the use of "Wanted" posters that included a doctor's photo, address, and contact information. Private investigators showed members of the organization how to use video surveillance against clinic employees. Before, rescuers made progress by presenting themselves as the victims of violence. Operation Rescue National's new focus instead intended to scare providers into submission.[65]

When the Supreme Court handed down its opinion in January 1993, the *Bray* decision ratified an emerging compromise reached in debate about conscience and the role of the judiciary. Writing for a five-justice majority, Justice Antonin Scalia began by noting that NOW could succeed only if "op-

position to abortion can reasonably be presumed to reflect a sex-based intent" or if activists' intent was not relevant at all. *Bray* rejected both positions. Scalia easily dismissed any effort to equate sex discrimination and pro-life activism. "Whatever one thinks of abortion," *Bray* reasoned, "it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class."[66]

To the *Bray* Court, the fact that only women got pregnant and had abortions made no difference. In reaching this conclusion, the Court cited a widely criticized 1974 decision, *Geduldig v. Aiello*, holding that pregnancy discrimination did not count as sex discrimination. For the *Bray* majority, bias against persons who were or could become pregnant looked quite different from sex discrimination. The Court dismissed NOW's fundamental-rights claims even more summarily.[67]

Just the same, *Bray* distinguished those with "common and respectable" views on abortion from lawbreakers. *Bray* did not echo rescuers' understanding of themselves as legitimate interpreters of the law. A year earlier, when the *Casey* Court had refused to overrule *Roe,* Scalia had highlighted both the invalidity of the 1973 decision and the American people's response to it. In Scalia's view, *Casey*, like *Roe*, read like a call to revolution for citizens tired of judicial overreaching. "[T]he American people love democracy," Scalia proclaimed in *Casey,* "and the American people are not fools." Scalia contended that if the Court continued to impose its views on the voting public, "the people *should* demonstrate, to protest that we do not implement *their* values instead of *ours*."[68]

When members of the rescue movement did take to the streets to condemn what they saw as judicial tyranny, Scalia did not present blockades as a natural extension of the *Roe* Court's activism. Instead, the *Bray* majority defended only the sincerity and respectability of the mainstream—and law-abiding—pro-life movement. For Scalia, arguments about popular authority, democracy, and judicial overreaching represented nothing more than a justification for overruling *Roe*.

The March 1993 murder of Dr. David Gunn further undermined the legitimacy of antiabortion law-breaking. Near Gunn's Pensacola clinic, Michael F. Griffin, an antiabortion protestor, shot the doctor in the back several times and killed him. Together with the attempted murder of Dr. George

Tiller in Wichita the following August, Gunn's killing brought to the surface some rescuers' support for the use of lethal force. Rescue America, the extremist antiabortion group to which Griffin had belonged, called his actions "unfortunate," all the while raising money for his legal defense. Young activists attending Operation Rescue National's training sessions debated the morality of lethal force—a discussion that rapidly consumed the shrinking ranks of the rescue movement. For strategic, religious, and ideological reasons, some, like Flip Benham and Keith Tucci, opposed the use of any violence against clinic staff.[69]

However, almost thirty activists signed a statement justifying the use of force and calling for Griffin's acquittal if he killed "to defend the lives of unborn children." Others preferred to neither condone nor condemn Griffin's actions. Activists Michael Bray and Paul Hill brought arguments for lethal force to the media. Hill became a familiar figure on television talk shows, where he promoted the legitimacy of force, while Bray penned a book proclaiming the morality of killing abortion providers. The violence debate rocked an already struggling blockade movement. In an effort to stave off rebellion, Tucci asked the leaders of Operation Rescue National attending a major meeting to sign a pledge opposing the use of violence. For years, Operation Rescue had allowed only those who signed such a pledge to participate in blockades. But at a leadership meeting in Florida, as many as ten or twelve of those present refused to sign. The controversy sparked by the move reportedly led to Tucci's resignation in early 1994. Internal divisions about violence compounded the blockade movement's difficulties in attracting members.[70]

Some advocates' praise of deadly force also smoothed the way for tough new laws against clinic blockades. In May 1994, Congress passed the Freedom of Access to Clinic Entrances Act (FACE), a law that imposed strict criminal and civil penalties on anyone who used "physical force, threat, or physical obstruction" to prevent anyone from entering a reproductive healthcare facility. At the state and city levels, from California to Massachusetts, lawmakers passed "buffer zone" and "bubble" laws limiting how close antiabortion activists could get to clinics or to women seeking their services. In June 1994, in *Madsen v. Women's Health Center, Inc.*, the Supreme Court held that a thirty-six-foot buffer zone imposed by a state court did not violate the First Amendment, paving the way for more laws of the same kind.[71]

Facing steep penalties, only the most committed blockaders remained active, and those open to the use of violence believed that they had less to lose when more peaceful forms of protest could result in serious punishment. Indeed, in July 1994, Paul Hill murdered Dr. John Britton and his bodyguard, Lieutenant Colonel James Barrett, outside the Ladies Center in Pensacola, Florida. Jay Sekulow's American Center for Law and Justice (ACLJ), a group with a record of defending rescuers, withdrew from defending Hill, trying to distinguish violent killers from "peaceful protesters." NRLC and AUL leaders denounced Hill's actions, but the damage was done. Hill became not only the first person prosecuted under FACE but also the most visible proponent of arguments that laypersons, rather than judges, should have the power to decide when to obey the law.[72]

With Hill's case in the spotlight, NARAL leader Kate Michelman insisted that the entire rescue movement had incited people like Hill and Griffin. "The inflammatory rhetoric . . . and concepts such as 'murderer' and 'baby killer' create the conditions for extremist individuals to feel justified in taking violent actions," she told the media. In testifying in favor of FACE, David Gunn Jr., the son of the murdered doctor, similarly claimed that if the government had sent a clearer message that courts, not protestors, defined the law, his father would still be alive.[73]

By the mid-1990s, the debate about the limits of conscience-based protest seemed settled. Pro-life law-breaking took on an association with physical aggression, harassment, violence, and even murder. When protestors claimed to act for reasons of conscience or to interpret the law, few believed them. Operation Rescue (and later Operation Rescue National) modified their tactics, largely abandoning the blockades that made both groups famous. While the blockades faded away, public association of *Roe* with judicial activism had not. Soon, even abortion-rights activists themselves reconsidered the usefulness of rhetoric centered on *Roe*, privacy, and the right to choose.[74]

Questioning the Value of Privacy Arguments

Throughout the 1980s, the leaders of major abortion-rights organizations began to second-guess the value of arguments based on the *Roe* decision. Sympathetic scholars had written extensively about the problems with *Roe* much earlier on. Feminist commentators later insisted that *Roe* ignored the

importance of equality for women. But grassroots activists and even some lawyers did not feel bound by what the Court had said. Treating *Roe* as a valuable source of material, these advocates used ideas of choice and self-determination as key political and legal weapons.

However, by the mid-1980s, some movement members questioned whether the decision had become too entangled with resentment of the federal judiciary to advance reproductive justice. Activists' doubts about the value of privacy arguments launched a decade-long period of experimentation. At first, NARAL and NOW members set aside abstract arguments about choice to focus on women's real-world experience of abortion. Later in the decade, movement leaders' commitment to building a political majority trumped their wariness about a privacy-centered strategy. Ironically, this tactic deepened skepticism among the men and women most directly involved in reproductive health care. Abortion providers formed new organizations and made existing groups more ambitious and militant. Providers suggested that their movement could no longer make *Roe* stand for whatever women and doctors required. Instead, the political meanings of the decision had ossified, making it harder for providers to talk about abortion in a way that resonated with patients or with voters.

The mainstream abortion-rights movement's disillusionment with privacy-centered arguments did not, as some expected, come with the Supreme Court's willingness to uphold bans on the public funding of abortion. In 1977, a year after Congress passed the Hyde Amendment, the Court in *Maher v. Roe* upheld a similar Connecticut law. Some feminist women's health activists and women of color saw *Maher* and its companion cases as evidence of the problems with both *Roe* and the choice rhetoric associated with it. But notwithstanding these setbacks, leaders of organizations like NARAL and NOW continued to emphasize *Roe* and the right to privacy.[75]

In a 1977 letter to Congress, for example, NARAL leaders asked Congress to rethink the Hyde Amendment because "[t]he government should remain neutral and not take sides in a personal decision protected by the right to privacy." Even after 1980, when the Supreme Court in *Harris v. McRae* rejected a challenge to the Hyde Amendment on privacy grounds, movement members did not consistently stray from a choice-based strategy. Whereas *McRae* reinforced many feminist scholars' concerns about the right to privacy, members of NARAL and other abortion-rights groups still saw *Roe* and a related

right to choose as powerful tools. In a major 1981 media campaign, for example, NARAL put out an ad stating that "abortion is a profoundly personal, private matter that should be decided by a woman in consultation with her doctor, her minister, and her family." A related ad explained: "[a]ny woman who is pregnant should be able to decide whether or not she wants an abortion." It was not so much that activists found privacy reasoning any more doctrinally sound or emotionally compelling than did sympathetic scholars. Instead, in the early 1980s, members of groups like NARAL tried to tap into the political potential of claims related to *Roe*.[76]

But starting in the mid-1980s, new public-relations challenges made these activists question whether they had put too much stock in privacy arguments. In February 1985, Ronald Reagan hosted a screening of *The Silent Scream* at the White House. Produced by Crusade for Life, an antiabortion group, the film showed the suction abortion of a twelve-week-old fetus. With voiceover by former NARAL leader Bernard Nathanson, the film claimed to prove that unborn children suffered excruciating pain during an abortion.[77]

In some ways, *The Silent Scream* covered familiar ground. Since the late 1960s, abortion opponents had used slide shows and films. Just the same, *The Silent Scream* proved to be a surprising sensation. It was picked up by major organizations like NRLC, and numerous high school and college campuses hosted screenings. The film premiered on televangelist Jerry Falwell's program, and parts of the film aired more than three times on major networks in a one-month period.[78]

Across the abortion-rights movement, leaders concerned about *The Silent Scream* asked whether supporters of legal abortion had lost control of the terms of the debate. In a February letter to Judy Goldsmith, then president of NOW, NARAL leader Nanette Falkenberg wondered how activists could overcome the "sense of powerlessness and frustration among our supporters." Both Goldsmith and Falkenberg worried that the public did not always buy the right to privacy as a justification for keeping abortion safe and legal. As Falkenberg explained, the movement could make progress only if it "recapture[d] the emotional side of the issue."[79]

To achieve this goal, Falkenberg and other NARAL leaders promoted *Silent No More*, a campaign designed to bring abortion out of the closet. Although *Silent No More* did not draw on constitutional reasoning, its creators echoed the logic of feminist scholars like Sylvia Law and Ruth Bader Ginsburg.

These advocates worried that they had underplayed the importance of equality arguments for abortion, all the while making it seem that *Roe* had accomplished more than was really the case. "There is a myth, perpetrated by many in the anti-abortion movement, that the right to abortion was arbitrarily granted by the Supreme Court in 1973," materials for the campaign explained. "In fact, the right to abortion [in *Roe*] was won in large part because women began to speak out about abortion."[80]

NARAL leaders recognized how much the pro-life movement and the Republican Party had made *Roe* stand for the problems with the courts. For this reason, the framers of *Silent No More* could not overemphasize the need to "articulate a clear and persuasive reason aside from *Roe v. Wade* why abortion is and must remain a woman's right."[81] NARAL leaders further wondered if *Roe*'s idea of a right to choose made it harder for activists to talk about abortion in a way that made sense to American women. Reporting on the results of a strategy session, activists noted "that it is very hard to talk about 'choice' when there isn't enough money, when there isn't enough food to eat, when racism pervades every aspect of life."[82]

In March 1985, the NARAL Foundation hosted a strategy weekend to explore alternatives, inviting key litigators, activists, and consultants from a variety of reproductive-rights organizations. Most attendees believed that the *Roe* decision had become a stumbling block for the most committed proponents of legal abortion. As NARAL leaders wrote: "To protect the right to choose for all women, we must create a construct for that right beyond the framework of *Roe v. Wade*."[83]

The political headwinds of the later 1980s brought abortion-rights leaders back to arguments based on *Roe*. In 1988, NARAL leaders laid out a plan for reversing the gains made by the opposition. Instead of expecting the judiciary to enforce the Constitution, NARAL leader Kate Michelman and her colleagues asserted that rights depended on ordinary politics. Majority support could "create a climate that makes it unacceptable to overrule *Roe v. Wade*."[84]

The only message a majority seemed to support invoked public anxiety about losing the rights that many felt they already had. While most Americans felt ambivalent about abortion, most voters understood "the absolutely compelling need to keep reproductive rights free from government intrusion." *Who Decides*, NARAL's campaign focused on freedom from government

interference, was aimed primarily at increasing the number of voters who identified with the movement's cause. In defining a "win," an internal memorandum on the campaign highlighted "evidence of numbers and a potential pro-choice majority."[85]

To capture the largest number of supporters, members ultimately decided to endorse a privacy-centered idea of what the Constitution said, one that NARAL connected to preserving *Roe*. As consultant Jackie Blumenthal explained, arguments built around *Roe* appealed to Americans who hated big government and feared dramatic change. "The main thrust in the theme . . . ," she wrote, "is a populist message designed to reach a broad cross-section of Americans."[86]

In November 1989, when Congress first considered the Freedom of Choice Act (FOCA), a federal statute codifying the *Roe* decision, NARAL leaders committed more deeply to a political defense of the right to privacy. FOCA developed as a direct response to the Supreme Court's most recent abortion decision, *Webster v. Reproductive Health Services*. A divided plurality upheld much of a multi-part Missouri statute. The most revealing part of *Webster* analyzed a fetal-viability provision. Under this portion of the Missouri law, physicians had a duty to consider whether a pregnancy had reached the twentieth week or beyond. If so, a provider had to make independent medical findings on fetal viability.[87]

The doctors and clinics challenging the law argued that it violated *Roe* by superimposing the judgment of the government on the protected discretion of doctors. In a plurality decision, the Court rejected this claim, upheld the Missouri law, and cast doubt on the future of *Roe*. Writing for two other justices, Chief Justice William Rehnquist stopped short of saying that the Court should get rid of *Roe* but still identified any conflict between the statute and the 1973 decision as evidence not that the Missouri law was flawed but rather that *Roe* was "unsound in principle and unworkable in practice." Justice Antonin Scalia wrote separately to state more explicitly that the Court should overrule *Roe* altogether.[88]

After *Webster,* the future of the *Roe* decision seemed uncertain, and the states had much more latitude to regulate abortion. In July 1990, when Justice William Brennan, a stalwart supporter of reproductive rights, announced his retirement, pro-life groups had even more reason to press their advantage. Between 1989 and April 1991, seven states introduced new abortion

restrictions, and 200 more bills were pending. While NARAL and its allies sponsored a state-by-state survey to explore the possibility of passing a federal constitutional amendment or electing a pro-choice president, FOCA seemed to be the only way out of messy and endless battles in the states. As NARAL leader Laura Ucelli explained: "We can't go on . . . in this defensive posture."[89]

The movement's reinvigoration of privacy arguments upset many of the abortion providers who had begun forming organizations of their own. Providers reasoned that the *Roe* decision had become shorthand for the dysfunction of the courts. The members of organizations like the National Coalition of Abortion Providers (NCAP) argued that the time had come for the movement to redefine itself. While some feminist scholars and activists had questioned the value of arguments based on *Roe* from the very start, in the 1990s, when the debate focused on late-term abortions, providers raised a more direct challenge to the political rhetoric that had long been so dominant in movement circles.

Abortion providers had organized as early as 1977, when the National Abortion Federation (NAF) formed as a support group and clearinghouse for information about policy. Providers turned to NAF partly to deal with new economic and personal obstacles. In the late 1970s, when many states introduced bans on the use of public dollars or facilities, abortion practice shifted away from hospitals and into freestanding clinics. Many of these new clinics specialized in abortion services—a decision that exposed providers to political hostility, medical challenges, and legal threats that other health-care professionals often avoided.[90]

Formed with the encouragement of NARAL, NAF both politicized providers and allowed them to set standards for care and improved techniques. In advocating for providers, NAF required what one member called "uneasy alliances"—articulating conflicting views of what abortion care ought to mean. NAF included physicians, managers of feminist women's health centers, owners of chains of clinics, and leaders of Planned Parenthood facilities. Over the course of the 1980s, NAF members increasingly found themselves in competition for the same customers and fundraising dollars. In the years after 1973, a larger number of Planned Parenthood clinics began offering abortions, sometimes opening shop in communities where independent clinics already operated. Competition among providers intensified

over the course of the 1980s, as larger, specialized facilities performed 80 percent of all procedures by the end of the decade.[91]

Dissatisfaction with NAF helped to catalyze a movement away from arguments based on *Roe*. Some independent providers believed that NAF blindly followed the tactical approach set by NARAL and NOW. In 1989, Renée Chelian, a prominent provider, went so far as to terminate her NAF membership. "We don't want NAF to be an organization fighting for abortion rights," she explained. "We want NAF to be an organization fighting for abortion providers."[92]

Over time, the cracks in NAF widened, and a group of feminist providers worked to form a new organization that would champion the interests of independent clinics. Many of those dissatisfied with NAF wanted to go beyond privacy arguments. Peg Johnston was one of these activists. Raised in a political family, Johnston recalled "being very moved by justice issues." As a young woman, she worked with a rape-crisis hotline and created a space that hosted cultural events for lesbians. When she became the director of a clinic in Vestal, New York, Johnston found herself on the front line of efforts to defend abortion rights. When Randall Terry first began experimenting with blockades, Johnston took the lead in counterprotests. She described herself as "the one who frog-marched picketers out of the office," the "heavy" who earned the nickname "Falls on Picketers" from her colleagues.[93]

In 1988, however, a patient opened Johnston's eyes to an alternative vision of a reproductive-health movement. A woman from Pennsylvania had struggled so much with the procedure that the clinic doctor asked Johnston to counsel her further. After the patient shared her personal story, Johnston saw new costs in a political strategy defined by reaction to the opposition. As Johnston put it, "Who is more profitable to listen to: the picketers or the patients?" By listening to patients and moving away from rights rhetoric, as she explained, providers could break away from the stalemate created by abortion opponents and create a "more rewarding, more interesting, and . . . more radical" reproductive politics.[94]

The concerns expressed by activists like Chelian and Johnston resonated with other providers and clinic operators. In 1989, Charlotte Taft, an NAF member and feminist provider, reached out to fifty colleagues who felt "isolated and unsure of what to do next."[95] Those providers and directors looked for a place to find reassurance and a forum for the free exchange of

ideas. This group, later called the November Gang after the date of the group's first meeting, became a vital source of support for increasingly embattled providers.[96]

Other providers envisioned a more formal alternative to NAF. Susan Hill and other providers called a meeting about forming a new advocacy group for those who worked in or directed clinics. These gatherings led to the formation of the National Coalition of Abortion Providers (NCAP), and the group hired Ron Fitzsimmons as its lobbyist. In 1990, in detailing the plan for NCAP, Fitzsimmons suggested that *Roe* had sometimes come to stand for the need to curb the power of the courts. Supporters of abortion rights spent so much energy trying to define *Roe* in their own terms that they did not fully develop a response to pro-life attacks on abortion providers. Because abortion-rights leaders had to constantly refute arguments about judicial activism, no pro-choice politician had "set the record straight about what actually goes on in a clinic."[97]

At the height of a political battle about dilation-and-extraction abortion (D&X), a later-term abortion procedure popularly known as partial-birth abortion, NCAP forced others to rethink the value of privacy arguments. D&X became a political issue in 1993 after Dr. Martin Haskell presented a paper on how to perform the procedure at the annual NAF conference. Haskell's paper leaked, and during the fight for FOCA, Minnesota Citizens Concerned for Life, an NRLC affiliate, put out an ad claiming that passing the law would mean that D&X procedures would spread. After 1994, when Republicans gained control over the House of Representatives for the first time since 1952, Douglas Johnson, a leading NRLC lobbyist, worked with Representative Charles Canady (R-FL) to draft a bill banning what the two called "partial-birth abortion." Because Americans were the most ambivalent about abortion later in pregnancy, focusing on D&X framed the issue in a way that favored the pro-life movement, and by the mid-1990s, D&X stood at the top of the nation's abortion agenda. Congress passed a federal ban at the end of 1995, but President Bill Clinton vetoed it, and the Senate failed to override the veto. With late-abortions center stage, the abortion-rights movement found itself in a politically difficult position. A July 1996 Gallup Poll found that more than 70 percent of respondents favored a prohibition on D&X. Democrats in Congress did not defend the procedure, instead proposing a

ban on all abortions after fetal viability unless a procedure was needed to prevent "grievous injury" to a woman's health.[98]

When Republicans again pushed for a federal ban, NARAL and other groups described the campaign against D&X as a direct attack on any woman's freedom from state interference. Kate Michelman agreed that the "bill would devastate *Roe v. Wade* and the freedom to choose."[99]

In February 1997, frustrated by the movement's continuing emphasis on privacy, Fitzsimmons gave an interview on D&X, admitting that he had "lied" about the number of procedures performed annually. While initially trying to conform to the strategy used by others in the movement, Fitzsimmons later concluded that underestimating the number of D&X procedures performed served only to stigmatize them further. He claimed that unless the movement was "frank with the public about all aspects of abortion," prolifers would have an easier time seeking more and more restrictions.[100]

For at least some NCAP members, Fitzsimmons's statement created a valuable opportunity. Some NCAP members argued that the mainstream movement had chastised Fitzsimmons for putting *Roe*'s right to choose in jeopardy. However, these activists believed that this commitment to preserving *Roe* at all costs was destroying the movement from within. Charlotte Taft invited her colleagues to rethink their movement's rhetorical focus. Abortion-rights leaders had been caught in a back-and-forth with pro-lifers about whether *Roe* stood for judicial tyranny or the nation's commitment to privacy. By moving beyond this impasse, the movement could forge a more compelling message. As she explained: "Reproductive freedom is a means to achieve a certain quality of life. It is the QUALITY of life that is important to women in so many ways—not birth control and abortion."[101]

NCAP and its allies later elaborated on this theme, portraying Fitzsimmons's gaffe as an opportunity to move away from *Roe* and its rights rhetoric. "We must take the moral offensive by discussing the reality of abortion as experienced by our patients: the relief, the conflict, the confusion, the empowerment, the sadness," one NCAP memorandum asserted. "There is no more powerful moral justification for abortion than the experiences of millions of women."[102]

The mainstream abortion-rights movement also wondered if privacy arguments had lost their power. By constantly fending off arguments involving

judicial activism, attendees at a Planned Parenthood symposium asked whether they had let pro-lifers make abortion "a dirty word." Some NARAL leaders shared this worry. By having to fight so hard to make *Roe* a symbol of privacy rights, the movement had abandoned equally important moral questions. NARAL members proposed a greater emphasis on "the impact [abortion] decisions have on . . . partners, families, and communities."[103]

Notwithstanding the anxieties produced by the partial-birth-abortion wars, mainstream groups most often continued describing their cause in reference to *Roe* and a right to choose. However, NCAP's failed revolution served as a stark reminder of how the *Roe* decision and the right to privacy no longer always seemed to be effective weapons, even for some of the groups that most naturally relied on a right to choose. While *Roe* had once seemed to be a potent symbol even for movements entirely removed from the abortion wars, the political climate of the late 1980s and 1990s made even supporters of legal abortion consider whether privacy arguments no longer were worth the trouble.

A Symbol of Unwise Judging

For over a decade, varied social movements had used the *Roe* decision to set out novel ideas about what the nation's new embrace of privacy and individualism could mean. *Roe* was used in this way despite flaws in the Court's reasoning decried by scholars across the ideological spectrum. As early as 1973, even sympathetic commentators questioned whether there was any real constitutional basis for the Court's decision. Some feminist scholars viewed *Roe* with disappointment. Still others saw the very idea of a right to privacy as inherently limited, particularly after the Supreme Court used it to shut down a challenge to abortion funding bans.

Although some grassroots activists shared these concerns about both the Court's original decision and the right to privacy, many did not feel limited by what the Court had said. In the abortion debate, activists made *Roe* stand for what they believed the Court should have done. They described a right to choose, a right to control one's body, or a right to participate fully in the life of the nation. In other political battles, movements made powerful use of both the Court's original decision and popular reinterpretations of it. These activists did not believe that *Roe* had been a perfect decision, and

many of them paid little attention to the Court's original words. Just the same, they saw both *Roe* and the right to privacy as helpful tools.

However, in the 1980s, leaders of the Republican Party worked to disconnect *Roe* from any idea of autonomy. Within the legal academy, commentators had never pulled any punches about the flaws of the 1973 decision, but the Reagan administration worked to convince the public that *Roe* was a symbol of judicial tyranny. Reagan and his allies used the idea of conscientious objection to explain why judicial activism should matter to voters. If *Roe* was antidemocratic, then voters had a moral obligation to choose candidates who would guarantee that it was no longer the law.

This argument would not always have appealed to pro-lifers. Movement leaders had long viewed judicial-activism arguments as irrelevant to the rights at the heart of the abortion struggle. As the movement aligned with conservative organizations and with the Republican Party, pro-lifers put arguments about judicial activism and conscience to new use. Activists argued that any voter committed to democracy should vote for candidates who would see to it that the decision was overruled.

Starting in the late 1980s, the controversy surrounding the Bork nomination hearings and the clinic-blockade movement changed how some Americans defined and reacted to judicial overreaching. Influenced by changes in the politics of racial equality, women's rights, and judicial nominations, public dialogue about judicial activism revealed unresolved questions about what law meant, who had the power to interpret it, and how Americans could express their conscience when faced with an unjust law.

Some mourned the decline of the blockade movement. John Cavanaugh-O'Keefe still believes that the movement profoundly misread the setbacks of the 1990s. In his view, FACE and the possibility of higher penalties for clinic protestors were a "huge success," bringing to light the persecution faced by the unborn and those who supported them. But he believes that the movement lost its way when no one in the pro-life leadership stood up to teach "the difference between a war and a campaign of non-violence."[104]

By contrast, James Bopp Jr. saw debate about *Roe* and judicial activism as a stunning success. To balance the demands of its constituents against the need to appear principled and impartial, the Reagan administration helped to make *Roe* a symbol of judicial tyranny. Within the pro-life movement, Bopp and his colleagues used arguments involving judicial overreaching to cement

their alliance with the Republican Party, build momentum in the courts, and energize constituents. As one of the movement's most sophisticated strategists, Bopp had no shortage of accomplishments, but he was particularly proud of convincing so many that *Roe* was "a quintessential example of judicial activism."[105]

As Bopp recognized, making *Roe* shorthand for judicial overreaching made a difference outside of the abortion context. For much of the 1970s and 1980s, a wide variety of movements used *Roe*'s right to privacy to advance their cause. By the early 1990s, however, Bopp and his colleagues made it costly to tie any cause to *Roe*. Instead of reminding Americans of the importance of individual choice, *Roe* had often become a cautionary tale about the courts.

Conclusion

In may 2016, the Supreme Court stood ready to hear a case about contraceptive access and religious liberty. On the courthouse plaza, nuns, prolifers, conservatives, progressives, and feminists rallied to defend competing visions of conscience and choice. The case at the center of the protest, *Zubik v. Burwell,* was just the latest fight about a birth-control mandate written into President Barack Obama's Affordable Care Act. The mandate required that insurers make available certain preventive services, including all FDA-approved methods of birth control, without deductions or co-pays. Religious believers had first challenged the law several years earlier, and in *Burwell v. Hobby Lobby Stores, Inc*., a divided Court had held that the Religious Freedom Restoration Act required accommodation for closely held businesses with religious objections. In the wake of *Hobby Lobby*, objectors could contact their insurers or the Department of Health and Human Services, and insurers would then have to offer coverage without requiring any direct employer participation. In *Zubik* and the seven cases consolidated with it, a group of religious employers argued that this accommodation was not good enough. The case turned on issues of statutory interpretation and legal precedent. But protestors saw the case as a referendum on the meaning of

autonomy and choice. While feminists called for reproductive self-determination, other placards and buttons identified opposing participants as "women for religious freedom."[1]

Jeanne Mancini, the leader of the antiabortion group March for Life, asserted that pro-lifers and nuns were on the side of freedom of choice. "The federal government does not have the right to declare that serving the elderly poor, or educating students from a religious mission, is not 'religious enough' to count for exemption," she explained. Compassion and Choices, a right-to-die organization, contended that the religious employers involved in the cases wanted nothing less than to undermine constitutional autonomy. If the religious organizations had their way, the "adverse impact on constitutionally guaranteed choice in health care [would be] undeniable."[2]

In 2016, a depleted eight-member Supreme Court did not reach a decision on the merits in *Zubik*. Instead, the Court sent the case back to the lower courts and asking the parties to arrive at an approach that balanced the needs of the government and the religious concerns of those seeking accommodation. But *Zubik* was neither the first nor the last battle about the true meaning of choice and autonomy. Earlier, in June 2015, the Supreme Court dealt with one of these fights in *Obergefell v. Hodges*, a blockbuster case on same-sex marriage. After the circuit courts of appeal split on whether the Constitution prohibited bans on same-sex marriage, the Supreme Court agreed to hear the case, and Justice Anthony Kennedy's majority held that states could not outlaw same-sex marriage.[3]

Those with clashing views about *Obergefell* claimed to know what constitutional self-determination really was. Relying on the Due Process and Equal Protection Clauses, Justice Kennedy wrote that "[t]he Constitution promises liberty to all within its reach, a liberty that includes specific rights that allow persons, within a lawful realm, to define and express their identity." Conservative Christian groups angry about the Court's decision responded that *Obergefell* undercut the autonomy of other Americans. "Many Christian people . . . find their identity in Jesus Christ," wrote William Wagner, a prominent critic of the decision. "For followers of Jesus, it is undeniable that it is the personal choice most central to their individual dignity and autonomy." In the wake of *Obergefell*, gay, lesbian, queer, bisexual, and transgender activists used the idea of autonomy set out in the Court's decision to demand protection from discrimination in other areas, including em-

ployment. Those, like Wagner, who resisted the decision have argued that forcing employers and businesses to serve gay customers violates their own freedom of decision making.[4]

Struggles over the meaning of privacy and autonomy continue to break out. The importance of information privacy made the news in the aftermath of a 2016 terrorist attack in San Bernardino, California. When FBI officers had trouble unlocking one of the suspected terrorists' smartphones, law enforcement asked Apple for help. Citing the importance of privacy rights, Apple refused. Although the FBI eventually managed to unlock the phone on its own, the case again raised questions about what privacy means and when it can be compromised. In the spring of 2017, right-to-die proponents also invoked a right to choose in pushing to legalize assisted suicide in Nevada.[5]

Given familiar criticisms of the right to privacy, the contemporary importance of related claims might be surprising. To some, the right to privacy did too little to stop government meddling. Civil libertarians complain that the state can too easily track individuals' digital footprint without anyone ever knowing. Consumers take issue with companies' willingness to monitor and store keystrokes and clicks. The legal right to privacy set out in the 1970s seems to have done next to nothing to head off this kind of violation. From the standpoint of policy, the right to privacy also seems inherently limited. In constitutional law, commentators still express skepticism about whether privacy claims, standing alone, would be very useful in producing social change.[6]

And for those concerned about judicial overreach the right to privacy seems to have done too much. Conservative politicians and activists still treat *Roe* as the foremost example of judicial activism. When the Supreme Court held that the Constitution protected the liberty of same-sex couples seeking to marry, opponents compared the decision to *Roe* and other privacy cases, and not favorably so.[7]

By studying how Americans once reimagined *Roe*, we get a better sense of why privacy arguments still have such power. Throughout the 1970s and beyond, activists, attorneys, and politicians made *Roe* (and popular reinterpretations of it) stand for ideas far removed from the Court's original decision. These actors drew on related, but distinct, ideas about privacy, choice, self-control, and autonomy, defining all of them in novel ways. For many in the past, the right to privacy was both elastic and compelling, touching on

everything from sex to consumer rights, mental health, control over information, and death and dying. Understanding the ways that Americans reinvented *Roe* allows us to see how readily advocates made the right to privacy their own. These actors resisted limitations many associate with privacy, calling for government protection and assistance and invoking concerns about equality and discrimination.

To be sure, the history of those who used the decision as a symbol also illuminates some of the pitfalls of yoking a cause to the right to privacy today. The hardening of partisan positions made it less appealing for conservatives to tie their causes either to *Roe* or to a right to choose. And after conservative politicians and pro-lifers popularized concerns about judicial activism, groups seeking the recognition of new liberties worry that a privacy-based strategy risks possible backlash, particularly if activists are working in the courts.[8]

Even the Supreme Court has moved past the *Roe* decision. In 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court refused an invitation to overrule *Roe* altogether, but the plurality opinion did overhaul abortion doctrine, jettisoning the trimester framework created in *Roe,* criticizing the 1973 decision for undervaluing the government's interest in protecting fetal life, and describing an abortion right that had as much to do with sex equality as with privacy. Although the media still carry stories about whether *Roe* will be overruled, *Casey* made *Roe* far less relevant for lawyers seeking a hook for their own constitutional arguments.[9]

Although many movements no longer use *Roe* as a symbol, the stories of those who once reinvented the decision helps us make sense of why related arguments have been so resilient. As this history suggests, the idea of a right to privacy continues to command attention because it could mean—and can mean—much more than lawmakers or courts currently acknowledge. And in light of this history, it is no surprise that Americans even now describe their own fight as a quest for autonomy.

Significantly, several influential debates turn partly on the value of *Roe*'s right to privacy. What difference would it make if we better understood the world activists hoped to use the decision to fashion?

A New History of the 1970s

Historians, legal theorists, political scientists, and other commentators study the 1970s because the decade marked an important turning point. Jefferson Cowie argues that the 1970s revealed the fragility of the working class, a group divided along lines of race, gender, and political preference. Although many believed that the New Deal had given rise to a broad policy consensus, any agreement fell apart over the course of the decade. Historians from Bruce Schulman to Thomas Borstelmann describe the economic angst and disaffection with the government that marked the decade. The 1970s put an end to the postwar prosperity many had taken for granted. Anti-unionism, plant closings, deindustrialization, oil shocks, and inflation created a new era of insecurity and scarcity. At the same time, the seemingly unshakable faith Americans had in the problem-solving capabilities of the government shattered. Americans increasingly endorsed free markets, deregulation, and small government. This shift coincided with the reemergence of the Right as a serious force in American politics.[10]

The so-called Me Decade also saw the rise of a culture centered on the ideas of individual rights and formal equality. As it became more acceptable to leave Americans to the mercies of the market, overt discrimination became increasingly unacceptable. Private forms of prejudice often remained untouched, but life in the United States appeared strikingly diverse and inclusive. Identity-based social movements became a familiar feature of political debate, and more Americans denounced official, open bias against women, minorities, and gays and lesbians.[11]

Other commentators have noted creative and concerted efforts made by movements unhappy with the rise of small government and individualism. But by exploring the work of those who made the *Roe* decision part of their argumentative agendas, we can see how many movements used the very rhetoric of individualism to describe a different vision of the future. While it might have seemed inevitable that the nation would put more stock in individual liberty and privacy, movements intensely contested what privacy and liberty involved.[12]

Sometimes using *Roe* as a symbol, these advocates debated the role of government in helping the poor and disabled, the tension between privacy and secrecy, and the preconditions for making a meaningful choice about sex,

health care, and death. Some believed that deregulation had not gone far enough and tried to eliminate government control of medicine or end-of-life decision making. Other actors did not believe that the rise of the right to privacy would spell the end for robust government involvement. These activists often used *Roe* to ask for stronger protections for poor people, minorities, or other vulnerable populations. They called on the government to prevent sexual violence and information leaks. Movement members sometimes argued that the right to choose required the state to intervene—to guarantee economic security, personal safety, or control over one's own identity.

Other advocates used *Roe*'s right to privacy to advance bold ideas about what it meant to treat someone equally. Drawing close connections between privacy, choice, and self-control, movements challenged ideas about who had the dignity and competence to contribute to important life decisions. Speaking for children, those suffering from mental illness, poor people, consumers, and the elderly, these advocates rethought who had a right to make choices and why. Others questioned what it would really require for the government to leave someone alone, maintaining that privacy meant nothing without respect for what people did in public.

The history of *Roe* and its legacy also shows that the nation's investment in individual liberty had clear limits, and hitching a movement's star to the right to privacy did not always pay off as expected. Movements realized that some justifications for government interference simply carried too much weight for privacy proponents to overcome. Advocates for alternative medicine ran up against popular worries about unsafe drugs. Right-to-die advocates struggled when politicians or judges spotlighted an interest in protecting the disabled, weak, sick, or elderly.

Other movements lost out because consensus about what privacy meant quickly fractured. Champions of information privacy or patients' consumer rights agreed on very little and saw their coalitions collapse from within. Feminists, sex workers, gay and lesbian activists, and civil libertarians fighting for sexual freedom learned that they had sharply different goals in mind.

Tying a cause to individual privacy often did nothing to resolve the most urgent debates about the nation's future. Even when arguments about a right to choose made headway, many movements failed to convince key actors that their substantive demands were just. Gay and lesbian groups aban-

doned privacy arguments partly because they said nothing about the legitimacy of same-sex relationships. Those representing the mentally ill effectively promoted a right to refuse treatment but had little luck in undermining stereotypes surrounding mental illness. Activists seeking access to unproven treatments eventually lost out when they failed to establish that their favored remedies were safe or effective.

Ultimately, the history studied here reminds us how much remained up in the air once the nation set a course toward individualism. A variety of social movements debated what role the government should take in a more atomistic society. Others questioned whether or when there was a weighty enough interest for the government to step in. Uncertainty surrounded who should have a say in the evolving territory of individual rights. When were individuals too young or too old to be given autonomy? When were they too weak, too incompetent, or too incapacitated? When did liberty for one individual go too far, compromising the rights of someone else? Well beyond the 1970s, these questions had no clear answer.

The ideas of privacy rights explored in this book show the many roads not taken on the way to the nation's new culture of small government and formal equality. Features of today's debate that seem so inevitable once troubled even those most vocally in favor of more autonomy. Those active in the 1970s certainly understood just how different the politics of privacy could have been and could be once again.

The Value of Privacy Arguments

Roe encapsulates much of what made the 1970s important, but the decision matters for other reasons as well. Significantly, the Court's opinion occupies an important place in feminist scholarship, legal theory, and historical research on what privacy means in modern America. Critics of the Court's decision use it to showcase the flaws of leading concepts of privacy. Other commentators point to *Roe* in explaining that privacy arguments could be transformative, even if these claims depart from what the Court said in 1973.

A contradictory picture of privacy emerges from these studies. On the one hand, the privacy right written into *Roe* strikes many as unconvincing. "[T]he right to privacy is not thought to require social change," Catharine MacKinnon has argued.[13] Robin West claims that *Roe*'s right to privacy left

in place not just the threat of sexual violence but also the "profoundly inadequate social welfare net and hence the excessive economic burdens placed on poor women and men who decide to parent." Some scholars, including Reva Siegel, Rosa Ehrenreich, and Martha Fineman, have expressed similar concerns.[14]

Other commentators believe that privacy arguments ignore the obligations that members of society owe to one another. According to Michael Sandel, *Roe* wrongly "conceived of intimate relationships as entirely the product of personal choice."[15] Mary Ann Glendon also describes *Roe*'s privacy interest as "the quintessential right of individual . . . isolation."[16]

Historians have suggested that the idea of privacy defined in *Roe* fundamentally failed to protect individuals, whether the issue was health care services or surveillance. Some scholars have drawn a direct line between the Court's decision and subsequent setbacks for women requiring publicly funded health care. Others see *Roe*'s privacy idea as a core example of how court-created rights failed individuals facing a massive new surveillance state.[17]

Different scholars have contended that it is too soon to give up on privacy arguments. Legal theorists suggest that the individual exercising privacy rights need not be isolated or selfish. For example, James Fleming has asserted that critics of *Roe* and the privacy cases overstate "the supposed dichotomy between . . . choice and the republican appeal to moral goods." Lucinda Peach has insisted that critics of privacy rights assume the legitimacy of community morality on matters like abortion, ignoring the fact that "notions of a single monolithic community are problematic."[18]

A properly understood privacy right strikes other commentators as far more promising. Elizabeth Schneider has reasoned that the kind of privacy right recognized in *Roe* "provides an opportunity for self-development . . . and for protection against endless caretaking." Anita Allen and Linda McClain have maintained that *Roe* and cases like it can be read, as Allen writes, to involve "freedom from . . . outside interference with decision-making and conduct, especially respecting appropriately private affairs."[19]

Some historians have indicated that certain privacy claims could have real power. Jennifer Nelson has documented the ideas of choice created by women of color and feminist health activists in the decade after *Roe*. Estelle Freedman has traced how feminists have gravitated to the "principle of choice" because

it "balance[s] an affirmation of women's child-bearing capacity with recognition of the economic vulnerability mothers still face."[20]

Scholarship across a variety of disciplines creates a complex picture of privacy. Some commentators suggest that privacy arguments undercut the responsibility of the government toward the poor and of individuals toward one another. Others see privacy as a justification for existing power arrangements, an obstacle in the way of those who require support from the government or the community to have meaningful constitutional rights.

Studying the history of *Roe*'s many uses helps to make sense of these contradictions. In the 1970s, when neither major party had taken a firm position on abortion, the politics of privacy were wide open. Arguments about a right to choose did not immediately bring to mind either abortion or women's rights. Many activists drew a close connection between ideas of liberty or privacy and freedom from discrimination. Advocates also rejected any idea that privacy rights did not require public assistance for the poor. Movement members further defined an idea of dignity closely connected to privacy, one that tied an individual's personal identity to her freedom of decision making.

Feminists and gay and lesbian activists took on the public / private distinction commentators have criticized, arguing that rights to choose required protection against sexual violence and respect for the dignity of relationships visible in public. Former patients seeking to reform mental health care insisted that privacy rights required state support for those too poor to help themselves. Civil libertarians who worried about information leaks drove home how sensitive information allowed employers, doctors, businesses, and members of law enforcement to circumvent any protection against discrimination. Right-to-die proponents wrestled with the relationship between choice and bias against the disabled, suggesting that privacy allowed an individual to control how others saw her.

In the following decades, shifts in the larger political landscape made these experimental ideas of privacy less tenable. As a result of political-party realignment over abortion, conservatives distanced themselves from the arguments about choice some saw as synonymous with *Roe*. Ronald Reagan and the Right popularized an idea of autonomy connected to the virtues of free markets, small government, and deregulation. Reagan's victories in 1980 and 1984 seemingly established public backing for the retreat of the government from most areas of life. Movements across the ideological spectrum had

reason to tap into what seemed to be fresh support for freedom from the government.

At the same time, Reagan and his allies in the pro-life movement worked to discredit *Roe* and broad conceptions of privacy. Drawing on an established dialogue about judicial activism in the academy, conservatives tried to bring the public into conversation about the role of judges in American democracy. Reagan and his colleagues made *Roe* shorthand for the worst kind of judicial tyranny. As privacy arguments began to carry obvious risks, more movements started to avoid them. Activists' loss of interest in privacy arguments did not come quickly, and some still define choice in surprising terms today. Nevertheless, to many, the political cost of arguments about a right to choose had come to seem too high.

This history helps to explain the skepticism some scholars express about the inherent conservatism of privacy arguments. Indeed, over the course of several decades, a narrow idea of freedom from government interference took on greater prominence. But as this book makes plain, the rise of this concept of privacy was never inescapable. As so many realized in the 1970s, privacy arguments had an unrealized power and fluidity that could make a difference in politics and in court. We should not be surprised if a vision of privacy that now seems a permanent feature of politics changes once again.

Popular Use of Blockbuster Judicial Decisions

In recent years, scholars have taken a fresh look at when and how the public participates in debate about the Constitution. Skeptics worry that the courts have monopolized constitutional interpretation, disenfranchising ordinary people who should have a stake in the meaning of fundamental rights. Other commentators have highlighted ways that social movements and lay citizens continue to engage in dialogue about the Constitution. Reva Siegel has studied how feminists laid claim to the founding text, forging ideas of equal treatment that later reverberated in court. Rebecca Zietlow has explored how the Tea Party has invoked the Constitution to justify a particular method of constitutional interpretation.[21]

Studies have established that popular constitutionalism reaches beyond ideas about the founding text. Many of these studies focus on *Brown v. Board of Education*, the Supreme Court's renowned decision on school desegrega-

tion. Martha Minow has studied the "emergence of *Brown* as a resource for enterprising and visionary reformers concerned with gender, disability, religion, and other topics." Acknowledging that schools remained segregated decades after *Brown*, Minow offers a broader perspective on the decision's legacy. She evaluates how it inspired those interested in challenging other forms of inequality, triggered a movement for school choice, intensified social-science research about the real-world impact of discrimination, and created a powerful story about the role of law in creating social change.[22]

Studies have told a similar story about the role of lay actors in redefining *Brown*. Reva Siegel has explored how different justifications for *Brown* first appeared in fights about the decision's legitimacy. Anxieties about whether the *Brown* Court had gone too far prompted the spread of what Siegel calls an "anticlassification" understanding of *Brown,* one focused on colorblindness. Anders Walker and Christopher Schmidt chronicle efforts of white southerners to reinvent and redefine *Brown*.[23]

The history studied here adds a different dimension to scholarship on popular constitutional engagement with judicial decisions. The book first shows how movements using a decision can radically depart from its original language. Activists invoked *Roe* in debates that had nothing to do with reproductive rights or even health care. Movements' ability to bend and transform other judicial decisions may similarly defy our expectations.

The many uses of *Roe* also shed new light on the reasons that movements may use blockbuster decisions to achieve their goals. Although it sparked mass resistance in the early years, *Brown* later seemed like a logical choice for social movements because it gained so much acceptance. By contrast, *Roe* is now, and has been for some time, profoundly divisive. Nevertheless, activists with very different goals found reason to use the Court's decision. *Roe* was widely known and publicly visible, attracting those looking for an instantly familiar symbol for a cause. The sweep of the Court's decision also seemed to appeal to those working for far-reaching social change. The decision created important material for activists seeking to create new ideas about the Constitution. *Roe* illustrates how judicial decisions can become important symbols even when an opinion does not enjoy near-universal support.

The story told here thus raises new questions about why and when movements turn to judicial decisions in articulating their demands. Do activists mostly care about the visibility of a decision? How much does the subject or

reasoning of a decision matter? Was *Roe* unique in its value as a symbol, or do other decisions hold out similar promise? This book lays an important foundation for those seeking answers to these questions.

Reappraising *Roe's* Legacy

In 2015, when the Supreme Court agreed to hear its first major abortion case in almost a decade, scholars and media pundits revisited *Roe*'s legacy. In 2016, *Whole Woman's Health v. Hellerstedt* struck down Texas antiabortion clinic regulations that claimed to protect women's health. However, the Court's latest decision offered only one of many chances for leading thinkers to weigh in on what *Roe* means to our culture and politics. Over the course of several decades, feminist commentators have sometimes portrayed *Roe* as a landmark moment in the lives of American women. Sociologists conclude that *Roe* exposed deep differences in views of sexuality and gender. Kristin Luker contends that in the aftermath of *Roe* the abortion dialogue became a "referendum on motherhood." "Restrictions on abortion reflect . . . a failure to consider, in a society that is always at risk of forgetting, that women are persons," explains Reva Siegel.[24]

Other commentators blame the dysfunction and polarization of the abortion wars largely on *Roe*. Justice Antonin Scalia has claimed that "*Roe* fanned into life an issue that has inflamed our national politics in general." Ruth Bader Ginsburg has contended that the Court's decision to rely on privacy rather than sex equality guaranteed that conflict would only intensify, giving pro-lifers "a target to aim at relentlessly."[25]

Some historians and social scientists agree that *Roe* was ineffectual or even counterproductive. Gerald Rosenberg has suggested that *Roe* "seriously weakened pro-choice forces." Michael Klarman treats *Roe* as a classic example of the backlash that results when a court moves too fast too soon. Highlighting the polarization that *Roe* supposedly produced, other commentators point to *Roe* in discussing the consequences of different methods of constitutional interpretation. Cass Sunstein reasons that a more narrowly decided opinion "would not have caused so much destructive and unnecessary social upheaval." Richard Posner sees the same kind of radicalization resulting from the Court's willingness to "prematurely nationalize the issue

of abortion." Many agree with William Eskridge and John Ferejohn that "[t]he Court should avoid the mistake of *Roe v. Wade*."[26]

More recent work has put the impact of the *Roe* decision in context. Scholars have explored the larger political, economic, and social forces that helped to explain the bitter conflict so many attribute to *Roe*. Others have showed that pro-life strategies evolved for reasons partly or wholly disconnected from the Court's decision.[27]

Few agree on whether *Roe* delivered in any meaningful way on what it promised. Yet largely missing from the public debate is any sense of the decision's tremendous influence beyond abortion. To be sure, *Roe* alone did not explain the experiments with the idea of a right to privacy studied here. Nor did the Court's decision cause anyone to make arguments about choice and autonomy. However, *Roe* still caught the attention of movements seeking to establish what the new political landscape would mean for intimate relationships, medical care, mental illness and disability, and death and dying. Those seeking to resolve the tension between commitments to individual self-determination and equal treatment sometimes looked to *Roe* in explaining how autonomy might require, rather than undermine, an attack on entrenched forms of inequality.

We have missed this history partly because we have misunderstood what *Roe* could mean. Scholars have justifiably expressed concerns about the soundness of the Court's opinion. But from the very beginning, those invoking *Roe* or ideas related to it viewed the decision primarily as a resource for creating new ideas about privacy. Some turned to popular reinterpretations of the decision. Others made *Roe* stand for ideas barely discussed in abortion politics.

When we understand this history, we can see that *Roe*'s legacy has been both misunderstood and underestimated. Raw material taken from the Court's decision figured centrally in an ongoing (and not always visible) debate about what a right to choose ought to mean. Those seeking important legal initiatives that address inequalities of sexual orientation, gender, disability, consumer rights, and age sometimes relied on *Roe* to frame their aims. At a time when the idea of self-determination seemed crucially important to many social movements, *Roe* was often there. The decision became part of the agenda of activists who disagreed with one another about the role of

government and the meaning of privacy and inequality. When privacy politics were up for grabs, many of those who wanted a say in what the future would look like turned to *Roe* to help articulate their goals.

Even after those debating the right to privacy no longer turned to *Roe,* a group of activists and politicians made the decision part of a vibrant discussion about popular interest in the Constitution and in the judiciary. In recent decades, debate about judicial activism has often revolved around *Roe.* The Court's decision repeatedly comes up in public discussion about what kind of judges should join the Supreme Court and when the courts have overstepped.

While we may know about *Roe's* role in abortion politics, the decision's legacy is far more complex. The experiences chronicled in these pages open a window onto an intense debate about the right to privacy that continues to this day. Those looking for a more expansive idea of constitutional autonomy need not look far back to recover ideas about choice that hold out promise in areas that we might not expect. Many tried to make the right to choose their own. They were civil libertarians and cancer sufferers, small-government conservatives and sex workers, feminists and physicians. The story of our own right to privacy cannot be told without them.

ABBREVIATIONS

ACCL	American Citizens Concerned for Life, Inc., Records, Gerald R. Ford Presidential Library and Museum, University of Michigan
AUL	Americans United for Life Records, Executive File, Concordia Seminary, Lutheran Church-Missouri Synod
ACLU	American Civil Liberties Union Records, Department of Rare Books and Special Collections, Seeley G. Mudd Manuscript Library, Princeton University
BAP	Bella Abzug Papers, Rare Book and Manuscript Library, Columbia University
BBP	Nina Berberova Papers, Beinecke Rare Book and Manuscript Library, Yale University
BFP	Betty Friedan Papers, Schlesinger Library, Radcliffe Institute, Harvard University
BGP	Barry Goldwater Papers, Hayden Library, Arizona State University
BSP	Barbara Seaman Papers, Schlesinger Library, Radcliffe Institute, Harvard University
CKP	Claire Keyes Papers, David M. Rubenstein Rare Book and Manuscript Library, Duke University
COYOTE	COYOTE Records, Schlesinger Library, Radcliffe Institute, Harvard University
CPK	*Choice* Magazine Records, Wilcox Collection, University of Kansas

DREDF	Disability Rights Education and Defense Fund Records, Bancroft Library, University of California, Berkeley
ERA	Equal Rights Amendment Records, University of Missouri-St. Louis
FCP	Florence Clothier Papers, Schlesinger Library, Radcliffe Institute, Harvard University
FFP	Frances Tarlton Farenthold Papers, Dolph Briscoe Center for American History, University of Texas at Austin
FGP	Frances A. Graves Papers, Special Collections, University of Washington Libraries
FWHC	Feminist Women Health Center Papers, David M. Rubenstein Rare Book and Manuscript Library, Duke University
GAA	Gay Activists Alliance Records, Manuscripts and Archives Division, New York Public Library
GSP	Gloria Steinem Papers, Sophia Smith Collection, Smith College
GSTP	Gloria Swanson Papers, Harry Ransom Humanities Research Center, University of Texas at Austin
HBP	Harry Blackmun Papers, Library of Congress
HRC	Human Rights Campaign Records, Division of Rare and Manuscript Collections, Cornell University
HSF	Hemlock Society of Florida Papers, Florida State University College of Law Research Center
HSM	Hemlock of Michigan Records, Bentley Historical Library, University of Michigan
JCO	John Cavanaugh-O'Keefe Papers, Wisconsin Historical Society, Library-Archives Division
JCP	Judi Chamberlin Papers, Special Collections and University Archives, University of Massachusetts-Amherst Libraries
JEP	Joseph Ebbesen Papers, Northern Illinois Regional History Center, Northern Illinois University
JRS	Dr. Joseph Stanton Human Life Issues Library and Resource Center, Our Lady of New York Convent, Bronx, New York
LEP	Liberty and Equality Papers, University of Missouri-St. Louis
LLP	Liberty Lobby Papers, Knox Collection of Extremist Literature, University of Mississippi Archives and Special Collections
MHP	Merle Hoffman Papers, David M. Rubenstein Rare Book and Manuscript Library, Duke University
MFJ	Mildred F. Jefferson Papers, Schlesinger Library, Radcliffe Institute, Harvard University
MRJP	Mary Johnson Papers, on file with the author
MRX	Father Paul Marx Papers, University of Notre Dame Archives
NARAL	National Abortion Rights Action League Records, Schlesinger Library, Radcliffe Institute, Harvard University

NARALMA	NARAL Pro-Choice Massachusetts Records, Schlesinger Library, Radcliffe Institute, Harvard University
NCAP	National Coalition of Abortion Providers Records, David M. Rubenstein Rare Book and Manuscript Library, Duke University
NGLTF	National Gay and Lesbian Task Force Records, Division of Rare and Manuscript Collections, Cornell University
NOW	National Organization for Women Records, Schlesinger Library, Radcliffe Institute, Harvard University
PCN	Pro-Choice Network of Western New York Records, State University of New York at Buffalo University Archives
PJP	Pam Johnston Papers, David M. Rubenstein Rare Book and Manuscript Library, Duke University
PLP	Paul K. Longmore Papers, University Archives, San Francisco State University
PSR	*Phyllis Schlafly Review* Collection, Schlesinger Library, Radcliffe Institute, Harvard University
R2N2	Reproductive Rights National Network Records, David M. Rubenstein Rare Book and Manuscript Library, Duke University
RCD	Robin Chandler Duke Papers, David M. Rubenstein Rare Book and Manuscript Library, Duke University
RHS	Reproductive Health Services Papers, University of Missouri-St. Louis
RMP	Richard Matty Papers, Wisconsin Historical Society, Library-Archives Division
RRP	Ronald Reagan Presidential Library, Simi Valley, California
SBL	Southern Baptists for Life Records, Southern Baptist Historical Library and Archives
TCP	Takey Crist Papers, David M. Rubenstein Rare Book and Manuscript Library, Duke University
VWS	Vada Webb Sheid Papers, Special Collections Division, University of Arkansas Libraries
WAP	Women Against Pornography Papers, Schlesinger Library, Radcliffe Institute, Harvard University
WCX	Wilcox Collection of Contemporary Political Movements, Kenneth Spencer Research Library, University of Kansas
WSH	Wilma Scott Heide Papers, Schlesinger Library, Radcliffe Institute, Harvard University

NOTES

In the notes, I use abbreviations to refer to documents found in archived document collections. Please refer to the preceding Abbreviations section for the full names and locations of these collections.

Introduction

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1. A History of Privacy Politics

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111. Alexandra Matsuyinka, "Women and Pornography," n.d., ca. 1986, NOW, Box 95, Folder 8. For Alexander's testimony, see Testimony of Dolores Alexander, n.d., ca. 1986, NOW, Box 95, Folder 8. For other expressions of this position, see Statement of Sarah Wyman of Women Hurt in Systems of Prostitution (WHISPER) to the National Organization for Women, March 23, 1986, NOW, Box 95, Folder 8; Testimony of Catharine MacKinnon before the National Organization for Women, March 24, 1986, NOW, Box 95, Folder 8.
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116. Sue Hyde, interview with Mary Ziegler, March 20, 2015. For more on the project's development and priorities, see Mark Blasius, *Gay and Lesbian Politics: Sexuality and the Emergence of a New Ethic* (Philadelphia: Temple University Press, 1994), 134–135; Sue Hyde, *Come Out and Win: Organizing Yourself, Your Community, Your World* (Boston: Beacon, 2007), 37–39.
117. For Olhoft's statement, see Stephen Smith, "Sodomy Law Repeal Moves to Senate," April 6, 1987, http://archive.mprnews.org/stories/19870406/sodomy-law-repeal-bill-moves-senate, accessed May 3, 2015. For more on the views of Olhoft and the Berean League, see Bob Potter and Wayne Olhoft, "Political Goals of the Berean League," August 14, 1985, http://archive.mprnews.org/stories/19850814/political-goals-berean-league-christian-group, accessed May 3, 2015. For more on the Minnesota and Maryland debates, see Hyde, *Come Out and Win,* 38, 40.
118. Kim Westheimer, "More Than a March," *Gay Community News*, October 1987, 1.
119. Michele Moore, "Sex and Politics in Rochester," *Gay Community News*, February / March 1989, 1. On the National Day of Mourning for the Right to Privacy, see Jennie McKnight, "Keeping Sodomy on the (Political) Agenda," *Gay Community News*, July 1989, 16. For more on Hyde's work in the period, see Memorandum, Sue Hyde to NGLTF Board of Directors, March 7, 1989, NGLTF, Box 100, Folder 6; Sue Hyde to NGLTF Board of Directors, May 5, 1989, NGLTF, Box 100, Folder 6.
120. Hyde, *Come Out and Win,* 39. On the Georgia protests and other acts of civil disobedience, see Eric Lichtblau, "Gay Activists to Risk Arrest in AIDS Protest," *Los Angeles Times*, October 10, 1987, 21.
121. For arguments from the period that sexual orientation was immutable, see Laurence Tribe, *American Constitutional Law,* 2d ed. (New York: Foundation Press, 1988), 1616; Richard Green, "The Immutability of (Homo)Sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis," *Journal of Psychiatry and the Law* 16 (1988): 537–539; Cass Sunstein, "Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection," *University of Chicago Law Review* 55 (1988): 1167. In the 1980s and 1990s, courts often proved skeptical of claims that sexual orientation was immutable or that sexual orientation was a suspect classification. See *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 563–575 (9th Cir. 1990). While lawyers defending the rights of gays and lesbians often argued that immutability was not required

to establish that a classification was suspect, academics increasingly contended that immutability arguments for sexual orientation were essentializing and inaccurate. For criticisms of immutability arguments, see Janet Halley, "Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability," *Stanford Law Review* 46 (1994): 519–521; Edward Stein, "Immutability and Innateness Arguments about Gay, Lesbian, and Bisexual Rights," *Chicago-Kent Law Review* 89 (2014): 633–635. More recently, the courts have revised and revived the concept of immutability, asking "not whether a characteristic is strictly unchangeable, but whether the characteristic is a core trait or condition that one cannot or should not be required to abandon." *Obergefell v. Wymyslo*, 962 F. Supp. 968, 990 (S.D. Ohio 2013), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), rev'd sub nom. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). For a critique of the new idea of immutability, see Jessica Clarke, "Against Immutability," *Yale Law Journal* 125 (2015): 2–101.

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123. Baime, interview.
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3. Mental Illness and the Right to Refuse Treatment

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2. Wendy Kapp, interview with Mary Ziegler, August 21, 2015.
3. Kapp, interview.
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Press, 1994), 415–444; Linda J. Morrison, *Talking Back to Psychiatry: The Psychiatric Consumer / Survivor / Ex-Patient Movement* (New York: Routledge, 2005). On the history of mental-health policy, see Murray Levine, *The History and Politics of Community Mental Health* (New York: Oxford University Press, 1981), 155–208; E. Fuller Torrey, *American Psychosis: How the Federal Government Destroyed the Mental Illness Treatment System* (New York: Oxford University Press, 2014), 61–75.

5. For the Court's decision in *Donaldson,* see *O'Connor v. Donaldson*, 422 U.S. 563 (1975). On the history of community health centers, see Levine, *The History and Politics of Community Mental Health*, 78–104; Torrey, *American Psychosis*, 77–108; John W. LaFond and Mary Durham, *Back to the Asylum: The Future of Mental Health Policy in the United States* (New York: Oxford University Press, 1992), 100–134.
6. See Louis D. Brown and Susan Rogers, "The Impact of Mental Health Consumer-Run Organizations on Transformative Change," in *Community Psychology and Community Mental Health: Towards Transformative Change,* ed. Geoffrey Nelson, Bret Kloos, and Rose Ornelas (New York: Oxford University Press, 2014), 108–112. For examples of these arguments in the period, see Testimony of Mental Patients Liberation Front in Support of House Bill #78—An Act Authorizing the Department of Mental Health to Allow Patients or Residents to Review Their Respective Records, March 21, 1974, JCP, Box 12, Mental Patients Liberation Front Folder 1; Position Paper by Robert J. Muller for Mental Patients Liberation Front, In Opposition to (Experimental) Psychosurgery for Behavioral Modification, n.d., ca. 1977, JCP, Box 12, Mental Patients Liberation Front Folder 1; Diane Baran to Sisters, October 15, 1976, JCP, Box 1, Alliance for the Liberation of Mental Patients Folder; Draft Statement of Purpose for the National Alliance of Mental Patients, 1986, JCP, Box 3, National Association of Psychiatric Survivors Folder. For discussion of MHLP's early focus on the right to treatment, see Jennifer Erkulwater, *Disability Rights and the American Social Safety Net* (Ithaca, NY: Cornell University Press, 2006), 47–58. For examples of the group's work on the subject from the period, see Joel Klein to Frances Farenthold, September 8, 1975, FFP, Box 3U193, 1973 MHLP Folder; Frances Farenthold to Ima Hogg, December 4, 1974, FFP, Box 3U193, 1974 MHLP Folder; Sissy Farenthold to Vic Bussy, July 22, 1975, FFP, Box 3U193, 1975 MHLP Folder; Pamphlet, "Every American's Right?" n.d., ca. 1975, FFP, Box 3U193, 1975 MHLP Folder. On the APA's changing position on the right to treatment, see LaFond and Durham, *Back to the Asylum,* 96–130; François Castel, Robert Castel, and Anne Lovell, *The Psychiatric Society* (New York: Columbia University Press, 1982), 103. For more on the significance of the right to treatment, see Levine, *The History and Politics of Community Mental Health*, 125–169.

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65. On the courts' rejection of efforts to define Laetrile as a vitamin, see *Rutherford v. United States*, 542 F.2d 1137, 1140 (10th Cir. 1976). Other courts had found this argument equally unconvincing, in analyzing both Laetrile and other products. See *Hanson v. United States,* 417 F. Supp. 30, 34–35 (D. Minn. 1976); *Kordel v. United States*, 335 U.S. 345 (1948) (compounds of minerals, vitamins, and herbs); *United States v. Millpax, Inc.*, 313 F.2d 152, 153–54 (7th Cir. 1963) ("iron tonic"); *United States v. 250 Jars . . . Fancy Pure Honey*, 218 F. Supp. 208, 211 (E.D. Mich.1963), aff'd 344 F.2d 288 (6th Cir. 1965) (honey). For the text of the act: 21 U.S.C. §321(g)(1). For movement arguments that Laetrile was a vitamin, see "Jones Decision," 1–3; Krebs Jr., "The Closing Ring," 4.
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Suprenand to Richard Matty, March 17, 1977, RMP, Box 2, Folder 9. For similar statements to this effect, see Anita J. Birr to Richard Matty, 1; Mrs. N. G. Koerner to Richard Matty, 1.

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5. Death, Discrimination, and Equality

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6. Press Release, September 5, 1989, PLP, Box 57, Folder 3; see also Press Release, "A State in Crisis," 1989, PLP, Box 57, Folder 3. With the help of disability-rights groups, McAfee ultimately obtained help to live independently, decided not to end his life, and became active in the disability-rights movement. See Clipping, Peggy Sanford, "McAfee Wants Job, Life outside of Nursing Home," *Birmingham News*, April 6, 1990, PLP, Box 57, Folder 3; Sonia Murray, "Discussions Seek to Find Solutions for Long Term Care in State," *In Town Extra*, January 25, 1990, E2, PLP, Box 57, Folder 3. He died several years later of complications from pneumonia. "Larry McAfee, 39, Sought Right to Die," *New York Times*, October 5, 1995, http://www.nytimes.com/1995/10/05/obituaries/larry-mcafee-39-sought-right-to-die.html, accessed February 19, 2015.
7. Before 1985, the issue of end-of-life care rarely appeared in appellate decisions, and defendants even less often faced imprisonment. For examples, see *People v. Roberts*, 211 Mich. 187 (Mich. 1920), overruled by *People v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994) (affirming murder conviction in mercy killing case); *Commonwealth v. Konz*, 450 A.2d 638 (Pa. 1982) (reversing an involuntary manslaughter conviction where husband refused medical treatment and wife did not pursue it on his behalf). This chapter later discusses internal struggles about the value of legislation to the right-to-die movement.
8. Later in the 1980s, high-profile mercy-killing cases became more common. See *Gilbert v. State*, 487 So.2d 1185 (Fl. App. 4 Dist. 1986); *Goodlin v. State*, 726 S.W.2d 956 (Tex. Ct. App.-Ft. Worth 1987). For contemporary coverage of new interest in prosecuting mercy killings, see Rita Rubin, "Mercy Killings: A Legal Gray Area," *Dallas Morning News*, March 31, 1985, 41A; "Prosecutors Say Motive, Love Not the Issue in Florida Mercy Killing Case," *Houston Chronicle*, May 8, 1985, 15. On the state court decisions in the period expanding the right to die, see *Brophy v. New England Sinai*, 497 N.E. 2d 626 (Mass. 1986); *Bouvia v. Superior Ct.*, 225 Cal. Rptr. 297 (Cal. App. 1986); *Rasmussen by Mitchell v. Fleming*, 741 P. 2d 674 (Ariz. 1987).
9. For examples of these arguments, see *News from Society for the Right to Die*, September 1, 1981, 3, MRX, Box 72, Folder 19; Evan R. Collins to Frances Graves, November 13, 1986, FGP, Box 2, Folder 6; Brief Amicus Curiae for Society for

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11. On the history of the antiabortion movement and end-of-life issues, see Ziad W. Munson, *The Making of Pro-Life Activists: How Social Movement Mobilization Works* (Chicago: University of Chicago Press, 2009), 118–121; Carol J. C. Maxwell, *Pro-Life Activists in America: Meaning, Motivation, and Direct Action* (New York: Cambridge University Press, 2002), 176–190; Dowbiggin, *A Merciful End*, 135, 147, 174; David R. Dietrich, *Rebellious Conservatives: Social Movements in Defense of Privilege* (New York: Palgrave Macmillan, 2014), 54. On the history of the disability-rights movement, see Doris Fleischer and Frieda Zames, *The Disability Rights Movement: From Charity to Confrontation* (Philadelphia: Temple University Press, 2001); Jacqueline Vaughn Switzer, *Disabled Rights: American Disability Policy and the Fight for Equality* (Washington, DC: Georgetown University Press, 2003); Samuel R. Bagenstos, *Law and the Contradictions of the Disability Rights Movement* (New Haven, CT: Yale University Press, 2009).
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ceptable to [Bouvia]"); Declaration of Saul J. Faerstein, MD, No. 159-780, in the Superior Court of Riverside County, October 27, 1983, 6, DREDF, Carton 7, Folder 18 (expressing expert opinion about Bouvia's rationality). This chapter later describes the galvanizing effect of Bouvia's case on disability-rights activists.

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6. Conscientious Objection, *Roe,* and the Role of the Judiciary

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6. On criticisms of *Roe* in the academy, see Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven, CT: Yale University Press, 1996), 47–56; David J. Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade (Berkeley: University of California Press, 1998), 605–617. On Nixon's attack on judicial activism, see Robert Mason, *Richard Nixon and the Quest for a New Majority* (Chapel Hill: University of North Carolina Press, 2004), 54–55; Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (New York: Farrar, Straus and Giroux, 2009), 250–254. This chapter later discusses some feminists' skepticism of *Roe*'s reasoning and impact.
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Ziegler, *After Roe*, 187–218; Williams, *Defenders of the Unborn*, 232–252. This chapter later discusses uses of arguments about judicial activism outside the abortion context.

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Bork as an ally in the war against the gay-rights movement. See Kenneth Noble, "Bork Backers Flood Senate with Mail," *New York Times*, September 3, 1987, A16.

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39. Loesch Wiley, email interview. Activists like Cavanaugh-O'Keefe and Harry Hand shared and publicized a similar definition of the law. See Pamphlet, John Cavanaugh-O'Keefe, "Non-Violence Is an Adverb," 1985, MFJ, Box 77, Folder 25; Pamphlet, Harry Hand, "Missed Your Cue?" n.d., ca. 1985, MFJ, Box 77, Folder 25; Pamphlet, "Pro-Life Direct Action: Ethics / Conscience," n.d., ca. 1985, MFJ, Box 77, Folder 25.
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44. For Operation Rescue's arguments in this vein, see Pamphlet, "Questions and Answers Concerning Operation Rescue," n.d., ca. 1988, 1–3, FWHC, Box 51, Operation Rescue Newsletter Folder. On the value activists put on overwhelming the legal system, see Operation Rescue, "Update from Atlanta," n.d., ca. 1989, FWHC, Box 51, Operation Rescue Newsletter Folder; see also Randall Terry, Letter from an Atlanta Jail, 1989, FWHC, Box 51, Operation Rescue Newsletter Folder ("This battle could show the Church and all America that the system

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Terry's effort to raise it, see Tracy Wilkinson, "Judge Rules against Main Defense of Anti-Abortionists," *Los Angeles Times*, August 9, 1989, 1; Tracy Wilkinson, "Abortion Foes Seek to Make the Court Their Forum," *Los Angeles Times*, August 8, 1989, 1. For discussion of the necessity defense and its elements, see *Cleveland v. Municipality of Anchorage*, 631 P. 2d 1073, 1078 (Alaska 1981). As early as 1973, clinic protestors invoked the necessity defense. See *State v. Marley,* 509 P. 2d 1095 (Hawaii 1973). In Missouri, Samuel Lee and John Ryan succeeded in using a necessity defense in the 1970s, as did protestors in Virginia. See Risen and Thomas, *Wrath of Angels*, 70–73, 140. By 1995, over fifty appellate opinions rejected the use of the defense in clinic blockades. See *United States v. Turner*, 544 F.3d 900, 902–903 (10th Cir. 1995); *City of Wichita v. Tilson*, 855 P. 2d 911, 915–916 (Kan. App. 1993) ("Every appellate court to date which has considered the issue has held that abortion clinic protestors . . . are precluded, as a matter of law, from raising a necessity defense").

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51. Charisse Jones and Carol McGraw, "Five Abortion Foes Acquitted of 24 Charges," *Los Angeles Times*, September 14, 1989, 1; see also Charisse Jones and Carol McGraw, "Jubilant Terry Readies Next Rally," *Los Angeles Times*, September 15, 1989, 1. For discussion of Zal's contempt conviction, see Alan Abrahamson, "Anti-Abortion Group's Lawyer Gets Jail Term," *Los Angeles Times*, February 3, 1990, 1; "Anti-Abortion Lawyer Released from County Jail," *Los Angeles Times*, October 4, 1990, 1; Alan Abrahamson, "Lawyer Zal Free on Appeal," *Los Angeles Times*, January 23, 1991, 8.
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53. *City of Wichita v. Tilson*, 855 P. 2d 911, 918 (Kan. 1993). For further decisions rejecting the necessity defense because of the legality of abortion, see *State v. Sahr*, 470 N.W. 2d 185, 191 (N.D. 1991); *State v. Rein*, 477 N.W.2d 716, 718 (Minn. 1991)

("The courts do not recognize harm in a practice specifically condoned by law"); *State v. Thomas*, 405 S.E. 2d 214, 216 (N.C. App. 1991); *State v. Anthony,* 24 Conn. App. 195, 209, 588 A.2d 214, cert. denied, 502 U.S. 913, 112 S.Ct. 312, 116 L.Ed.2d 254 (1991); *State v. O'Brien*, 784 S.W.2d 187, 192 (Mo. Ct. App. 1989); *People v. Crowley,* 142 Misc.2d 663, 668–669, 538 N.Y.S.2d 146 (N.Y. Just. Ct. 1989); *State v. Sahr,* 470 N.W.2d 185, 191 (N.D. 1991); *Kettering v. Berry*, 57 Ohio App. 3d 66, 68–69, 567 N.E.2d 316 (1990); *Commonwealth v. Markum*, 373 Pa. Super. 341, 347–348, 541 A.2d 347 (1988), cert. denied, 489 U.S. 1080, 109 S. Ct. 1533, 103 L.Ed.2d 837 (1989). For an example of rescuers' claim that they sought to prevent the performance of illegal abortions, see *United States v. Hill*, 893 F. Supp. 1048, 1049 (N.D. Fl. 1994).

54. Guy M. Condon, "Pro-Life Means Democracy in Wichita," *AUL Forum*, Summer 1990, 8, SBL, Box 1, Folder 7. For discussion of support for the rescue movement, see "Non-Violent Direct Action," *A.L.L. about Issues*, July 8, 1987, 3, FWHC, Operation Rescue Newsletter Folder. On AUL's legal representation of rescuers, see Paige Cunningham to Americans United for Life Board of Directors, July 5, 1993, MFJ, Box 13, Folder 5; Americans United for Life Board of Directors Meeting Minutes, October 22, 1993, 2. For activists' recollections of the appeal of the rescue movement: Frederica Mathewes-Green, interview with Mary Ziegler, August 5, 2014; Crossed, interview; Scheidler, interview; Benham, interview; Judie Brown, email interview with Mary Ziegler, August 8, 2014; Ryan, interview; Cavanaugh-O'Keefe, interview. On the tensions between NRLC and Operation Rescue, see Risen and Thomas, *Wrath of Angels*, 294, 375; Cynthia Gorney, *Articles of Faith: A Frontline History of the Abortion Wars* (New York: Simon and Schuster, 2000), 468. For recollections of these tensions: Bopp, interview; Mathewes-Green, interview; Tucci, interview.
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Conclusion

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