

Movement Litigation and Unilateral Disarmament

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The use of courts to achieve social change has long been criticized on the grounds that judicial victories tend to provoke unwanted political backlashes. Growing out of classic critiques of judicial power as counter-majoritarian (Bickel 1962), backlash arguments describe rights-protecting court decisions as not only democratically illegitimate but also counterproductive, in the sense that court-room victories encourage opponents to shift the conflict to a political terrain on which lawyers and judges cannot effectively compete. The often implicit and sometimes explicit implication of these arguments is that if movement litigators had relied on democratic rather than judicial politics, their policy victories would be more stable and better insulated from opposition. This comparative advantage is said to result in part from differences in institutional capacity—with legislative and executive institutions better able than courts to enforce compliance with their decrees—and in part from the fact that decisions issued by democratic institutions are more easily accepted (by their opponents) than decisions issued by undemocratic courts.

With regard to judicial politics in the post-World War II United States, this backlash critique has been developed at some length with respect to segregation, abortion, and same-sex marriage decisions. In an influential critique of *Brown v. Board of Education* (1954), Gerald Rosenberg (1991) argued that the decision was more-or-less irrelevant to the actual, on-the-ground progress of school desegregation in particular and civil rights more generally. In a subsequent account, Michael Klarman (2004) painted a picture that was in some ways even worse, with the *Brown* decision not irrelevant but actually counterproductive, at least in the short run. Klarman argued that prior to *Brown*, racial moderates were on the rise and slowly shifting southern segregationist politics, but that *Brown* preempted this incremental progress by clumsily inserting a broad judicial mandate for radical change. This mandate in turn sparked an increase in white supremacist activism across the South, thereby undermining the movement's goal of desegregation. Klarman's story turns brighter in the long run, as he emphasizes that the escalation of white supremacist violence eventually galvanized the northern political will to enact sweeping federal civil rights laws. Segregationist resistance collapsed in the face of this democratic victory because "on fundamental issues, losers accept a democratic defeat more readily than a judicial one" (Powe 2009: 250-51).

The backlash narrative of *Roe v. Wade* (1973) similarly emphasizes the danger of preempting legislative developments. In a widely noted 1985 essay, then-Circuit Judge Ruth Bader Ginsburg observed that "[i]n 1973, when *Roe* issued, abortion law was in a state of change across the nation. There was a distinct trend in the states, noted by the Court, 'toward liberalization of abortion statutes.'" But by "ventur[ing] too far in the change it ordered," the Court "stimulated the mobilization of a right-to-life movement and an attendant reaction in

Congress and state legislatures. In place of the trend ‘toward liberalization . . .’ noted in *Roe*, legislatures adopted measures aimed at minimizing the impact of the 1973 rulings.” If the Court’s decision had been more incremental, “the legislative trend might have continued in the direction in which it was headed in the early 1970s,” with majoritarian institutions acting on the concerns of reproductive rights advocates. In this context, “[h]eavy-handed judicial intervention was difficult to justify and appears to have provoked, not resolved, conflict” (1985: 379-82, 385-6). A variety of prominent scholars have echoed this general account. Rosenberg has observed that the Court simply joined “the tide of history” because public opinion “had dramatically shifted from opposition to abortion in most cases to substantial, if not majority, support” (1991: 247, 260). Cass Sunstein has suggested that the reproductive rights movement had no reason to engage in judicial politics because “states were moving firmly to expand legal access to abortion, and it is likely that a broad guarantee of access would have been available even without *Roe*” (1991: 766). Instead of barging into the debate with a sweeping intervention, the “Court should have allowed the democratic processes of the states more time to adapt and to deliberate, and to generate solutions that might be sensible but that might not occur to a set of judges” (Sunstein 1999: 54). And Mary Ann Glendon (1987) has argued that abortion is less controversial in other western democracies because the issue was resolved through democratic rather than judicial politics.

Finally, critics have leveled the same basic charge against same-sex marriage (SSM) advocates. Rosenberg (2008) argues that the SSM movement has been a failure because it has not achieved full marriage equality nationwide. While courts gave some limited victories by 2003, they also spawned a nationwide backlash that enacted “more legal barriers to same-sex

marriage after the litigation than there were before it” (2008: 416). Rosenberg attributes this counterproductive result to the facts that movement litigators went to court too soon, abandoned the more appropriate democratic process, and jumped over the achievable compromise position of civil unions directly to marriage (2008: 416-17). Klarman (2005: 477) similarly criticizes the SSM movement for avoiding democratic politics because litigation tends to “produce backlashes by commanding that social reform take place in a different order than might otherwise have occurred.” Klarman has sometimes been criticized for suggesting without evidence that political backlashes tend to be worse in response to sweeping judicial victories than they would have been in response to equally sweeping legislative victories (Keck 2009). After all, while the California Supreme Court’s legalization of SSM in May 2008 famously provoked a backlash at the polls, with the state’s voters banning SSM by enacting Proposition 8 later that year, the Maine Legislature’s legalization of SSM in May 2009 provoked exactly the same reaction there. More recently, Klarman has clarified that his “point is not that court decisions generate greater backlash than identical legislative policy resolutions would have, but rather that courts may issue unpopular decisions that legislatures ... would have avoided” (Klarman 2013: 167-68).

In sum, the backlash thesis can be boiled down to a simple proposition: judicial politics should be avoided because at best it will produce no significant social change and at worst it will produce political counter-mobilization that will set the movement further back than where it started. A number of scholars have criticized this thesis. David Garrow (1994) has objected to Rosenberg’s oversimplification of the process of historical change. David Fontana and Donald Braman (2012) report the results of a survey experiment that found little evidence to support

the view that legislatively enacted policies are more acceptable to opponents than judicially enacted policies. Scott L. Cummings and Douglas NeJaime (2010) have argued that even the Prop. 8 story in California—a poster child for the unnecessary judicial provocation of political counter-mobilization—turns out to fit the backlash narrative pretty poorly. In the abortion context, a number of scholars have emphasized that divisive moral conflicts generally turn on substantive policy disagreements, not on disputes about the proper institutional venue for settling the issue. For example, the framing of abortion reform had shifted by 1970 from a question of medical procedure to one of conflicting moral absolutes, a shift that effectively stalled the democratic political movement for abortion reform several years before *Roe* (Burns 2005; Lemieux 2004). Further, judicial politics and democratic politics do not preclude one another and in fact can be mutually reinforcing, serving as alternative or even complementary avenues to a given set of goals (Post and Siegel 2007). Under certain conditions, litigation can improve the odds of legislative reform by pushing the policy envelope and shifting the terms of compromise (Keck 2009). Finally, the definition of “democracy” used by backlash critics is usually quite narrow (if even specified). Significant work demonstrates that elected elites at times find it advantageous to delegate complicated policy disputes to the courts for action (Gillman 2002; Graber 1993; Lemieux and Lovell 2010; Lovell 2003; Whittington 2005).

Our critique here takes a different tack. We examine the backlash argument by focusing on the consistent admonition of these critiques that social movements should abandon judicial politics in favor of democratic politics. While perhaps intended to reduce the influence of courts and the risk of backlash, these critics rely on a naïve assumption that it is possible to remove courts from the American policy process. From the advocates’ perspective, the critique of

litigation amounts to a call for unilateral disarmament. In any given legal and political conflict—at least any protracted conflict that is sustained over a period of years—the likely result of a decision by one side to abandon litigation is not that the issue will be settled by legislative debate (let alone by an idealized deliberative democratic seminar). Rather, the likely result is that advocates on the other side will have free rein to pursue the issue in court, framed in a way that is most favorable to their cause.

Social movements seek social change and their opponents naturally resist, striving to maintain the status quo or even push change in the opposite direction. Contrary to backlash critics who frequently assume that movements seek change only in the courts, most movements employ “multidimensional advocacy ... across different domains (courts, legislatures, media), spanning different levels (federal, state, local), and deploying different tactics (litigation, legislative advocacy, public education)” (Cummings and NeJaime 2010: 1242). Assuming that it does not have the policy field to itself, moreover, any given movement is likely to face an array of opponents who are engaged in such multidimensional advocacy as well. While the LGBT rights movement is lobbying legislatures, going public in the media, and litigating to achieve its policy goals, its opponents on the religious right are engaged in the same tactics in an effort to prevent achievement of those goals. If proponents of LGBT rights laid down one item in this multidimensional toolkit, there is no reason to think that their opponents would do the same. From this angle, backlash arguments ignore the empirical reality that courts are an ever-present aspect of the American political system.

This system was designed to make political action difficult by putting multiple veto points in the way of movements seeking social change (Krehbiel 1998). Movements must

overcome each of these veto points while their opponents mobilize those points against them. As a result, the oft-heard suggestion that movements face a choice of whether to fight for change through the courts or through legislatures is misleading. Instead, the choice faced by movement leaders is whether their issues will be brought to court, and hence legally framed, by themselves or by their adversaries. In this light, the backlash thesis represents a call for political movements to abandon one viable means of achieving change and protecting their interests, even though their opponents will continue to exploit that means. Instead of legitimizing the movement's victories, refraining from litigation is likely to open those victories to legal challenges framed by their opponents. Left unchecked, their opponents' litigation efforts might succeed in thwarting their own legislative efforts in the short run and, in the long run, might even succeed in pushing the policy status quo in the opposite direction.

We explore the concept of unilateral disarmament through two important cases where proponents of the backlash thesis have criticized left-liberal social movements for abandoning democratic politics and going to judicial politics too early: abortion rights and the right to die. In both cases, contrary to conventional backlash arguments, the movements employed a variety of tactics, including both judicial and legislative politics. Yet opponents were not placated by being heard in an open democratic forum and turned to courts to block those changes. While the challenges were ultimately unsuccessful, they demonstrate that opponents of abortion rights and the right to die were willing and able to legally contest any democratic victory. If the social movements had followed the advice of backlash theorists, they would still have been drawn into court, but in a situation where their opponents dominated the legal field.

As we have noted, *Roe v. Wade* has been a common target of backlash critics, who complain that reproductive rights lawyers pushed too hard, too fast for radical social change, thereby instigating a massive public backlash. Further, this judicially imposed change was unnecessary because democratic politics was already solving the issue. The reality of abortion politics in the 1970s was more complex than these critics acknowledge. First, pro-choice activists did not abandon democratic politics in favor of the courts; rather, they used both avenues in a “multidimensional advocacy” campaign. Second, counter-mobilization against abortion rights pre-dated *Roe* and was quite strong in response to legislative as well as judicial changes in policy. As Scott Lemieux (2004: 214-57) has shown, backlash critics have tended to overstate the scope and durability of pro-choice legislative changes that took place prior to the onset of litigation. Gene Burns (2005: 208) describes how “legislative reform came to a stop after 1970” precisely because the legislative debates had moved away from the early medical humanitarian focus and had become polarized around competing moral rights claims advanced by both pro-choice and pro-life groups, arguments that legislators were unwilling or unable to resolve.¹ The Court did not cause this heightened moral battle, and arguably it was the only institution able to settle the issue after the legislative battles had pushed the debate to such extremes (Burns 2005: 228).

Third, and ultimately our concern here, the choice faced by pro-choice groups in the early 1970s was not whether the abortion conflict should be settled by courts or legislatures; the choice was when and how the courts would be drawn into the conflict. The New York

¹ Florida did adopt a liberalization statute in 1972, but only under the influence of a recent state court decision and not voluntarily (Garrow 1994: 538; Halfmann 2011).

experience makes clear that pro-life groups were ready and willing to invoke judicial politics to attack legislatively initiated abortion repeal because such groups “were concerned primarily about the substantive law of abortion, not about questions of judicial technique or even about the proper role of courts in a democracy” (Post and Siegel 2007: 410-11). Had pro-choice groups ceded the venue of judicial politics, that decision *might* have reduced the role of courts in settling the issue, but might instead have left the courts just as involved, but with their options defined and framed by the advocates’ pro-life opponents.

New York’s abortion politics proceeded similar to that of many other states in the late 1960s. Starting in 1965, Assemblyman Albert Blumenthal introduced a reform bill following the American Law Institute’s recommendation to widen the definition of therapeutic abortions to include those that are necessary to prevent risk to the mother’s physical or mental health, where the child would be born with grave physical defects, or where the pregnancy was the result of rape or incest (Nossiff 2001: 35). Though introduced every year, the reform bill was bottled up in committee and kept from a vote in the first few attempts. Opposition largely came from the Catholic Church, which in 1967 issued a pastoral letter to its New York congregants stating that “[s]ince laws which allow abortion violate the unborn child’s God-given right, we are opposed to any proposal to extend them. We urge you most strongly to do all in your power to prevent direct attacks upon the lives of unborn children” (Nossiff 2001: 80). In 1968, Blumenthal succeeded in getting the reform bill out of committee but moved to recommit the bill before the roll call vote was finished to avoid a certain defeat. Public polling at the time indicated greater support for reform, and during that same year, a commission appointed by Governor Nelson Rockefeller endorsed the reform path as well (Lader 1973: 122).

Convinced that he had the necessary 76 votes for support in 1969, Blumenthal pushed his bill forward again. During the debate, however, Martin Ginsberg, who was believed to be committed to support the bill (Lader 1973: 122), gave an impassioned speech linking the fetal deformity provisions to his disability caused by polio (Nossiff 1991: 95). Lader (1973: 123) asserts that Ginsburg's defection was "partly due to Catholic pressure on suburban counties." Regardless of the reason, his defection took enough votes to defeat Blumenthal's bill 69-78. This vote represented the last serious push for a moderate legislative reform.

Pro-choice reformers became increasingly disillusioned with the prospects of legislative change because the Catholic Church's unyielding position "precluded the possibility of any compromise" and increased the appeal of a full repeal of New York's abortion law, achieved either legislatively or through the courts (Nossiff 2001: 88). Frustrated with the years of legislative stalling and inaction on reform bills, four lawsuits were filed in 1969 challenging New York's restrictive abortion law (Greenhouse and Siegel 2010: 140). In the legislature, Assemblywoman Constance Cook had first introduced a repeal bill in 1968 at the behest of the National Organization of Women because she viewed any state involvement in abortion as intolerable, but Cook's bill drew only one co-sponsor in 1969 (Garrow 1994: 385; Nossiff 2001: 89). In 1970, however, Cook's repeal bill drew twenty additional co-sponsors, including Blumenthal, now disillusioned with the reform position after the 1969 defeat (Garrow 1994: 385, 408). In January, Governor Rockefeller stated that he would "probably" sign a repeal bill (Lader 1973: 128). In February, the Senate Majority Leader announced that he would allow a floor debate on the Cook bill. With supporters calling on Senators to "separate their religious beliefs from their votes" and presenting abortion in a rights framework, the Senate narrowly

passed the repeal bill, 31-26 (Nossiff 2001: 98). During the vigorous debate in the Assembly, Cook accepted a compromise of a 24-week time limit on permissible abortions. On April 9, with the vote deadlocked, 74-74, Assemblyman George Michaels, from a heavily Catholic district in Central New York, rose to switch his vote, saying “[w]hat’s the use of getting elected if you don’t stand for something. I realize, Mr. Speaker, that I am terminating my political career, but I cannot in good conscience sit here and allow my vote to be the one that defeats this bill” (Lader 1973: 143).² With passage assured, the Speaker added his vote for a final tally of 76-73. The Senate then quickly passed the bill with the 24-week limit intact, and Governor Rockefeller signed it into law, marking the biggest pro-choice win to date.

But the legislative repeal hardly quelled the debate. Pro-life forces rallied in opposition to the repeal and made significant gains in the Fall 1970 elections. In April 1971, Rockefeller was forced to accept a ban on Medicaid funding for abortions to pass his budget, and pro-life groups achieved passage of many local restrictions limiting providers from performing abortions outside hospitals or within particular areas (Lader 1973:157, 159-61). Pro-choice advocates responded with litigation aimed at clearing away these new restrictions upon the recently won abortion law, litigation that appeared promising for a time, but ultimately proved unsuccessful.³ In this climate, pro-choice advocates worried that the repeal law itself was in

² Michaels’s assessment of his political future proved correct. His county’s Democratic Committee rejected him, he lost the primary, and lost in the general election running on the Liberal ticket (Lader 1973: 146-47).

³ *City of N.Y. v. Wyman*, 30 N.Y.2d 537 (1972); *Klein v. Nassau County Medical Center*, 347 F.Supp. 496 (E.D.N.Y. 1972). The Supreme Court vacated and remanded the latter holding for reconsideration in light of *Roe*. *Commissioner of Social Services v. Klein*, 412 U.S. 925 (1973). The District Court reinstated its former opinion, but this holding was ultimately vacated in light of and undermined by *Maher v. Roe*, 432 U.S. 464 (1977). *Klein v. Nassau County Medical Center*, 409 F. Supp. 731 (E.D.N.Y. 1976), vacated by *Toia v. Klein*, 433 U.S. 902 (1977). The N.Y. Court of Appeals invalidated the local restrictions in *Robin v. Incorporated Village of Hempstead*, 30 N.Y.2d 347 (1972).

significant jeopardy in 1971, especially when Rockefeller announced his support for rolling back the law to 20 weeks, though he also indicated that he would veto any full repeal of the 1970 law (Garrow 1994: 483).

Meanwhile, pro-life groups decided to gear up for their own fight in 1972, utilizing both democratic and judicial politics. In 1969, the Catholic magazine, *America*, had published a call for pro-life litigation to protect the rights of fetuses. As the abortion issue moved into the courts, it said, the interests of fetuses must be represented by more than hospitals or prosecutors who may not truly care how the case comes out: "What the unborn child needs is the additional right to present evidence and to cross-examine the opposing witnesses. Without a full-scale, honestly adversary presentation of the facts and issues, the courts cannot properly resolve the constitutional aspects of abortion law debate." The comment specifically endorsed the idea of appointing guardians to protect fetal interests ("Abortion Laws and the Courts" 1969).

While we cannot know if he was influenced by this call, Fordham Law Professor Robert M. Byrn took up this challenge in late 1971. Byrn himself had published articles attacking the liberalization movement of the 1960s. He had also wrote the minority report to Governor Rockefeller's abortion commission report in which he objected to any reform of New York's abortion law, and he had described himself as "probably New York's No.1 foe of abortion" (Klemserud 1971: 48). In 1963, concerned with the rising talk about abortion, Byrn founded the Metropolitan Right to Life Committee with its office in the headquarters of the Archdiocese of New York (Merton 1981: 58). For Byrn, the only legitimate abortion was where the mother's life was at stake. He made no exception for cases of rape because "the wrong to the [woman] has

already been done, and . . . we ought not to compound that wrong by killing a life. We ought to bring all of the facilities of society together to help that mother and child” (Klemserud 1971: 48). A devout Catholic, Byrn stressed that his opposition rested upon the legal argument that fetuses are persons within the meaning of the Fourteenth Amendment and “has nothing to do with theology” (Tomasson 1971: 29).⁴

In late November 1971, Byrn filed suit in the Supreme Court, Queens County, seeking appointment as guardian ad litem of all fetuses from four to twenty-four weeks with a complaint claiming that New York’s abortion law violated the fetuses’ fundamental right to life. In his Petition, Byrn complained that the state granted pregnant women “unfettered discretion to terminate the lives of their unborn children” and that over 100,000 children had been killed since the law went into effect (Record: 21). He argued that a fetus is an “irreversibly individuated living human being, dependent on his mother only for nourishment and for a place to live, develop and grow” (Record: 23), and to drive home this point, he repeatedly referred to fetuses as “unborn children” or “unborn infants.” As human beings, fetuses are persons within the meaning of the Fourteenth Amendment and thus all constitutional rights attach to them. “First among these rights is the right to life itself without which all other rights are meaningless” (Record: 31). To support his claim that fetuses are separate human beings, Byrn presented four affidavits from doctors and biologists who regarded a fetus as a totally separate organism with an independent life history. As support for his claim of unfettered discretion, Byrn presented affidavits from five people, apparently employed by his legal firm, who called

⁴ Byrn’s legal briefs cited parallel state constitutional provisions, but he never developed these state constitutional arguments at length. As such, we refer to his challenge as if it was solely federal for simplicity.

twelve hospitals and one clinic.⁵ They reported the fees charged, the ease of obtaining immediate appointments, and the fact that “[n]either her husband nor a doctor has to recommend her for an abortion” (Record: 109). Justice Lester Holzman appointed Byrn as guardian on December 2 (Record: 17).

The suit immediately garnered widespread attention, with a number of women’s rights groups seeking to intervene in support of the Attorney General and the City’s Health & Hospital Corporation. After a failed attempt to change venue to Manhattan, likely out of concern for a bias against abortion in the Queens County bench, a hearing was held before an “overflowing” courtroom (“Order is Sought” 1971: 32). On January 4, 1972, Justice Francis Smith ratified the guardianship and issued a temporary restraining order against the abortion law, pending trial on the facts. While disclaiming any intent to resolve the legal or factual issues, Smith justified the decision to issue a temporary restraining order on the likelihood of Byrn’s victory. In justifying the appointment of Byrn as guardian, Smith stressed that the “court’s first obligation is to the infant” and “whenever in the course of any action it becomes evident to the court that the person having custody of an infant or representing the infant is unable or unwilling to perform his trust adequately, the court appoints a competent and willing guardian ad litem” and here “it is patently clear that there is a conflict of interest between a woman who desires to abort her child and the child itself” (Record: 301, 302). In assessing the rights of the “unborn child,” Smith concluded that the trend in American common law “clearly has been to recognize the existence of both fetal life and fetal rights at earlier and earlier stages” (Record: 309). Smith drew from these rights a recognition that “it is apparent that when the right to life of the

⁵ While not explicitly stated, it appears that each pretended to be pregnant or to be calling for a pregnant woman.

unborn child conflicts with some lesser interest of another then, even if his 'other' be the parent, the child's right is uniformly preferred" (Record: 312). Given all the legal rights that had been recognized, it would be ludicrous to say that the state "can legislate to deprive him of his most precious right – the right to life" (Record: 317). Whatever privacy interests women may have, they cannot outweigh the child's interest in life itself. Smith ordered a trial to hear testimony before issuing a final ruling.

The trial never took place, as pro-choice advocates mounted a swift reaction to Smith's order. Representing one of the intervening organizations, Nancy Stearns of the Center for Constitutional Rights stated that if the restraining order went into effect she would demand that Byrn "put up \$40,000 bond for each woman who is forced to have a child." NARAL released a statement stating that a "Roman Catholic judge has initiated a disgraceful incident in judicial history. He has followed religious dogma in deciding a case in a court of law" (Brody 1972: 26). The Appellate Division immediately stayed the effect of the order pending an appellate hearing. On February 24, the five-member panel held that given the facts at the time, the guardianship appointment was justified but that the substantive conclusions underlying the restraining order were incorrect.⁶ The Division held that the common law authorities recognizing some legal rights of fetuses were "regarded as benevolent fiction granted in anticipation of the child's birth" and if birth did not occur, no legal rights were recognized.⁷ The law never recognized full legal personality of fetuses and there is no indication that the framers of the Fifth or Fourteenth Amendments recognized such personality. One judge, stating that he rejected the extreme arguments presented by both sides of the litigation, would have allowed a trial on whether the

⁶ *Byrn v. New York City Health & Hospitals Corp.*, 38 A.D.2d 316 (1972).

⁷ *Byrn*, 38 A.D.2d at 329.

legislature's adoption of a 24-week time limit was rational, and he seemed to suggest skepticism on this point.⁸ Byrn appealed the decision to the New York Court of Appeals where he presented his legal argument most fully.

Meanwhile, events in the legislature paralleled Byrn's suit in attempting to rescind the abortion repeal through democratic politics. The Catholic Church increased its pressure after the failed 1971 session and was joined by a group representing Orthodox Jews, which had previously remained neutral in the debate. On April 16, Cardinal Cooke declared a "Right to Life Sunday" where every priest at mass attacked the abortion law in prelude to a major anti-abortion parade in New York City (Lader 1973: 196). Shortly after this demonstration, Rockefeller again announced willingness to compromise by lessening the time limit to sixteen weeks (later increased to eighteen), though he reiterated his promise to veto a complete repeal of the 1970 law (Garrow 1994: 546; Lader 1973: 200). After a vigorous legislative debate, with one member bringing a fetus in a jar for display and five members who supported the 1970 law switching sides, the Assembly voted to repeal the 1970 law 79-68 (Garrow 1994: 546). The Senate passed the same bill the next day, 30-27. On May 13, Rockefeller delivered on his promise and vetoed the bill. Though not naming the Catholic Church directly, Rockefeller noted that "the extremes of personal vilification and political coercion brought to bear on members of the Legislature raise serious doubts that the vote to repeal the reform represented the will of a majority of the people of New York State" (Greenhouse and Siegel 2010: 159). While expressing respect for diverse moral views, the governor rejected the moral arguments presented primarily by the Catholic Church: "I do not believe it right for one group to impose its vision of

⁸ *Byrn*, 38 A.D.2d at 331-34 (Gulotta, J., dissenting in part).

morality on an entire society. Neither is it just or practical for the State to attempt to dictate the innermost personal beliefs and conduct of its citizens” (Greenhouse and Siegel 2010: 160).

Opinion polls at the time found that about 60% of New Yorkers supported the 1970 law, justifying Rockefeller’s skepticism of the legislative action, but pro-choice groups did not expect the attempts at repeal to end and were especially concerned if Rockefeller decided to leave office (Garrow 1994: 547).

Contemporaneously with the democratic politics in the legislature, Byrn was pushing the judicial politics option, filing his brief with the Court of Appeals on April 17, the day after “Right to Life Sunday,” with oral arguments heard on May 30, only a few weeks after Rockefeller’s veto. The appellate briefs present the most complete picture of Byrn’s constitutional claims. After summarizing the medical evidence introduced before the trial court to show that fetuses are distinct human beings, Byrn argued that the law had recently turned to recognize this humanity and personhood of fetuses. Surveying recent changes in statute, equity, criminal, and tort law, Byrn concluded that “[a]dvances in medical science have persuaded courts to recognize that an individual who is human in fact ought also be human in law” (Plaintiff-Appellant’s brief at 33). Of particular importance was the abandonment of the old tort rule that injuries to the fetus are unrecoverable because the woman and fetus are one, indivisible being (Dubow 2011).⁹ Byrn turned to international legal norms for further support for fetal personhood, noting that the UN Declaration of the Rights of the Child discussed rights existing before birth. Additionally, he invoked the Nuremberg Tribunal charges of abortion in convicting Nazi war criminals. Those indictments had been specifically aimed at forced abortions, but Byrn

⁹ *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884); *Bonbrest v. Klotz*, 65 F.Supp. 138 (D.D.C. 1946).

used a selective reading of the arguments made by Justice Robert Jackson to conclude that “[o]n behalf of the United States of America, an American prosecutor condemned the defendants before a court composed of American judges because ‘protection of the law was denied to unborn children’” (Plaintiff-Appellant’s brief at 49).

Having established his case that the law treated fetuses as persons, Byrn turned to the constitutional claims. Of prime concern was including fetal life within the meaning of persons under the Fifth and Fourteenth Amendments. Drawing on colonial experience reinforced through Blackstone, Byrn argued that “Jefferson and the other framers of the Declaration of Independence were thinking of both post-natal and pre-natal human beings when they held as self-evident truths ‘that all men are *created* equal’” (Plaintiff-Appellant’s brief at 77, emphasis in original). Given this fact, the burden should be on the state to show that the Fifth Amendment was intended to exclude fetuses. More importantly, when the Fourteenth Amendment was drafted, twenty-five states had altered their abortion laws: “The whole thrust of the law at or about the time ... was to protect the unborn child against abortion at all stages of gestation” (Plaintiff-Appellant’s brief at 83). As the courts gradually expanded the definition of persons protected, it became increasingly clear that the only acceptable, objective definition of person was to include all human beings, and thus fetuses. Corporate personhood drew special scorn, with Byrn complaining that it would be “tragically ironic . . . if a corporation in the business of aborting unborn human beings were a person ... while the unborn human beings were not!” (Plaintiff-Appellant’s brief at 80). Given that fetuses are constitutional persons, they are entitled to all the rights any other person has, including the right to life, which is necessary for the establishment of all other rights. From this point, Byrn’s argument became a simple

application of strict scrutiny concluding that none of the asserted state interests were sufficient to overcome the fundamental right to life and the state's duty to protect that life.

Eight *amicus* briefs supported Byrn's argument. Three aimed primarily at the scientific arguments about the safety or medical necessity of non-therapeutic abortion. Two briefs from medical groups (one signed by approximately 200 doctors) expanded upon Byrn's argument that elective abortions are never necessary because modern medicine has left only de minimis risks associated with labor and delivery and because there is a significant demand for adoption (Amici Curiae brief for New York State Doctors and Nurses Against Abortion; Amici Curiae Brief for Dr. Bart Heffernan, et al.). The third challenged the argument that New York's act had reduced maternal mortality rates, infant mortality rates, and the number of criminal abortions and concluded that any minimal benefit remaining was clearly outweighed by the fact that "167,903 unborn children lost their lives in New York" since the law went into effect (Amicus Curiae Brief for Committee for Human Life at 16). The remaining amici focused on reinforcing aspects of Byrn's legal claims with a significant degree of moral attacks on abortion. In particular, three made specific references to Nazi Germany. One pro-life organization declared that "[t]he Nazi philosophy concerning abortion and euthanasia has many adherents among today's social engineers who advocate both as matters of right and necessity" (Brief of Amici Curiae Celebrate Life, et al, at 14). Another pointed to the slippery slope of allowing abortion to "merely suit the convenience of [the] mother": "Where do we go from here—to the senile parent, to the deformed or retarded child, or to the gas chambers of Hitler's Germany?" (Amici Curiae Brief of New York State Council, Knights of Columbus et al., at 15, 19). A separate brief representing a group of poor women on public assistance sought to reinforce this slippery slope

with arguments that elective abortions are the first step on the road to eliminating undesirables from society, primarily poor racial and ethnic minorities (Amici Curiae Brief for Mrs. Arlethia Gilliam, et al.). The arguments presented by pro-life groups centered on moral and medical objections to encourage the courts to adopt an evolving standard of rights: “it is important to keep in mind that the United States Supreme Court has stated that due process is not frozen within the confines of historical facts or discredited aptitudes, it being of the very nature of a free society to advance in its standards of what is deemed reasonable and right. To put it another way, due process representing a living principle is not confined within a permanent catalog of what may at a given time be deemed the limits or essentials of fundamental rights” (Amici Curiae Brief of New York State Council, et al., at 14).

While Byrn’s arguments proved unsuccessful, they did persuade two of the seven justices on the state high court. The five-judge majority rejected Byrn’s claims as a call for a policy judgment on the beginning of life—a call that was better directed to the state legislature—but Judges Adrian P. Burke and John F. Scileppi dissented vigorously, though Scileppi’s opinion was little more than assertion to support his “firm moral and legal belief that life begins at conception.”¹⁰ Burke’s wrote the primary dissent, though it was more focused on broad moral principles than concrete legal analysis. Burke began by discounting the legislative judgment, describing it as a policy established “by one Assemblyman who switched his vote after the resolution was defeated through some unknown influence” and then noting that the legislature had recently voted to repeal the act, though this action had been vetoed by

¹⁰ *Byrn*, 31 N.Y.2d at 213 (Scileppi, J., dissenting).

Governor Rockefeller.¹¹ Rather than relying on some specific constitutional provision, Burke argued that the 1970 statute “conflicts with natural justice” and that “the American concept of a natural law binding upon government and citizens alike, to which all positive law must conform, leads back through John Marshall to Edmund Burke and Henry de Bracton and even beyond the Magna Carta to Judean Law.”¹² This preeminence of natural law is recognized by the Declaration of Independence and its statement of an inalienable right to life, and the “Declaration has the force of law and the constitutions of the United States and of the various States must harmonize with its tenets.”¹³ While the Declaration recognizes the right to life, it is not the source of that right. Burke argued that: the right comes “not from the State but from an external source of authority superior to the State,” though he was careful to avoid clearly identifying this external source.¹⁴ Having established, to his satisfaction at least, an overarching right to life that transcends constitutions and positive law, Burke presented elective abortions as driven by only expedience and pragmatism, as a decision driven by the “particular female’s or male’s concern to avoid responsibility.” While this reference included the men as part of the irresponsibility, the tenor of his opinion is aimed at women as not only irresponsible but potentially driven by material gain. Under New York law, a child shares in a deceased man’s estate and this “legislation gives the ‘right’ to the wife to unilaterally, through abortion, appropriate the husband’s entire estate by preventing offspring and depriving the legally

¹¹ *Byrn*, 31 N.Y.2d at 205, fn* (Burke, J., dissenting).

¹² *Byrn*, 31 N.Y.2d at 205, 206 (Burke, J., dissenting).

¹³ *Byrn*, 31 N.Y.2d at 207 (Burke, J., dissenting).

¹⁴ *Byrn*, 31 N.Y.2d at 208 (Burke, J., dissenting).

wedded husband of transmission of his blood line, name and properties to ‘flesh of his flesh’:
another inalienable right.”¹⁵

Having established abortion as an act of irresponsibility, Judge Burke went on to reject all of the state’s justifications. On his reading, in an age of reliable contraception, there was no excuse for unintended pregnancies. (He did not address pregnancies resulting from rape.) In addition, no fetus was unwanted because of the long national waiting lists for adoptions, and as society was already reaching zero population growth, there was no need to limit procreation.¹⁶ Throughout this argument, Burke emphasized the connection to Nazi genocide, referring explicitly to Hitler twice, to the Nazis three times, and to genocide five times. He argued that the pragmatic arguments of expedience advanced by abortion rights supporters—such as reducing population growth and the pressure upon the welfare system—were also advanced “by Nazi lawyers and Judges at Nuremberg [and] . . . by the Soviets in Eastern Europe.”¹⁷ In Burke’s view, his colleagues in the Court’s majority believed that “the ‘state,’ as in Nazi Germany, could decide what human beings are persons or nonpersons.”¹⁸ New York’s abortion law tests the “United Nations Convention against genocide which forbids any Nation or State to classify any group of living human beings as fit subjects for annihilation.”¹⁹

Assisted Suicide in the 1990s

¹⁵ *Byrn*, 31 N.Y.2d at 209 (Burke, J., dissenting).

¹⁶ *Byrn*, 31 N.Y.2d at 206-207 (Burke, J., dissenting).

¹⁷ *Byrn*, 31 N.Y.2d at 205 (Burke, J., dissenting).

¹⁸ *Byrn*, 31 N.Y.2d at 211 (Burke, J., dissenting).

¹⁹ *Byrn*, 31 N.Y.2d at 208 (Burke, J., dissenting).

Twenty years after *Roe v. Wade*, advocates of terminally ill patients experiencing significant pain and suffering sought to build on that landmark precedent by persuading the Supreme Court to recognize a constitutional right to determine the time and manner of one's own death. When this legal claim began to make some headway, its advocates faced the same set of criticisms that reproductive rights advocates had for so long faced. Critics of the right-to-die movement objected that the issue of assisted suicide was properly the province of democratic politics and hence that it would be illegitimate for unelected judges to intervene. They also objected that right-to-die advocates were likely to provoke a counterproductive backlash by seeking a premature nationwide judicial resolution of an ongoing democratic debate. In a 1996 *amicus* brief, for example, constitutional scholar Michael W. McConnell argued that "the laws against assisted suicide have substantial moral and political justifications" and that "[t]he Fourteenth Amendment is not a license for judicial social experimentation." But he also argued that, even assuming that such laws "should be relaxed," "it would be a grave mistake for the federal courts to leap in and attempt, prematurely, to resolve the issue or to accelerate the pace of change." For one thing, "contending social forces are more likely to accept the outcome of a process in which their voices were heard than an imposed solution in which their elected representatives were not entitled to a significant role." Indeed, "[m]any supporters of abortion rights believe that those rights would have been achieved with less contention and greater public acceptance if the matter had been left to the political process, as in other Western nations. There is no reason to repeat those mistakes in this context."²⁰

²⁰ Brief of Senator Orrin Hatch, Chairman of the Senate Judiciary Committee; Representative Henry Hyde, Chairman of the House Judiciary Committee; and Representative Charles Canady, Chairman of the Subcommittee on the Constitution of the

As with abortion rights, however, the actual story of advocacy for and against the right to die was somewhat different than McConnell's account might lead one to expect. Right-to-die advocates themselves relied on a wide range of political strategies, including legislative politics and direct democracy as well as litigation. And their opponents did likewise, with right-to-life advocates opposing assisted suicide via legislative politics and direct democracy, but also resorting to litigation when the democratic channels were not going their way. In 1991 and 1992, advocates for terminally ill, mentally competent adults tried to legalize assisted suicide in Washington and California via ballot initiatives. Both measures were unsuccessful, with roughly 54% of each state's voters rejecting the effort to ensure that certain individuals had greater control over the time and manner of their own deaths. In 1994, the people of Oregon went the other way, with 51.3% of the state's voters supporting a so-called "Death with Dignity Act," but in most states, the electorate has remained unwilling to legalize assisted suicide.²¹

Meanwhile, right-to-die advocates sought to explore other potential strategic avenues as well. In 1993, they founded Compassion in Dying, an organization dedicated to expanding end-of-life choices, and in 1994, the group filed federal lawsuits in both Washington and New York, contending that the states' longstanding statutory bans on physician-assisted suicide violated the constitutional right to die. A Ninth Circuit panel rejected this claim in the Washington suit in 1995, but the following year, an *en banc* panel reversed, holding in an opinion by Circuit Judge Stephen Reinhardt that "there is a constitutionally protected liberty interest in determining the time and manner of one's own death." In Reinhardt's view, "[a]

House Judiciary Committee, as Amici Curiae in Support of the Petitioners, *Vacco v. Quill* and *Washington v. Glucksberg* (November 12, 1996), 7, 39, 24, 27-28, 51,

²¹ Similar initiatives were defeated at the polls in Michigan in 1998, in Maine in 2000, and in Massachusetts in 2012.

competent, terminally ill adult, having lived nearly the full measure of his life, 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.”²²

Reinhardt’s opinion called explicit attention to “the compelling similarities between right-to-die cases and abortion cases.” Citing *Planned Parenthood v. Casey* (1992), he noted that, “[l]ike the decision of whether or not to have an abortion, the decision how and when to die is one of ‘the most intimate and personal choices a person may make in a lifetime,’ a choice ‘central to personal dignity and autonomy.’”²³ Three judges dissented, and a few months later, one of them joined with two other Circuit judges in bitterly objecting to their colleagues’ refusal to reconsider Reinhardt’s holding. In this latter round of dissent, Circuit Judge Diarmuid O’Scannlain complained that Reinhardt’s opinion amounted to a “shockingly broad act of judicial legislation” and that the *Casey* decision was “a perniciously thin reed upon which to rest the majority’s radical holding.” Addressing the abortion issue, O’Scannlain described the supposed parallel between a decision to terminate a pregnancy and a decision to terminate one’s own life as “absurd.” On O’Scannlain’s reading, Reinhardt’s holding was rooted in nothing more than “the poetic language of *Casey*,” a decision that (in O’Scannlain’s view) rested “more on the basis of *stare decisis* than on a reasoned reaffirmation of the notion that abortion is a protected liberty interest.”²⁴

Meanwhile, a unanimous Second Circuit panel handed *Compassion in Dying* a victory in its other test case in April 1996, though this holding was issued on narrower doctrinal grounds

²² *Compassion in Dying v. State of Washington*, 49 F.3d 586 (9th Cir. 1995), reversed by *Washington v. Glucksberg*, 79 F.3d 790, 793, 814 (9th Cir. 1996).

²³ *Washington v. Glucksberg*, 79 F.3d 790, 800, 813-14 (9th Cir. 1996).

²⁴ *Washington v. Glucksberg*, 85 F.3d 1440, 1441-4 (9th Cir. 1996).

than the Ninth Circuit's had been.²⁵ Writing for the Second Circuit panel, Circuit Judge Roger Miner relied on the Supreme Court's recent restrictive precedents, particularly *Bowers v. Hardwick* (1986), in rejecting the broad due process liberty claim that Judge Reinhardt had accepted.²⁶ But Judge Miner nonetheless held for the plaintiffs on the alternate grounds that New York's ban on physician-assisted suicide violated the equal protection clause. State law allowed some but not all terminally ill patients to receive assistance in hastening their inevitable deaths; patients who were kept alive by life support were allowed to demand its removal, while patients who were not on life support were denied any such assistance. Judge Miner held that this differential treatment was unconstitutionally discriminatory.²⁷

SCOTUS stayed the Ninth Circuit opinion in June 1996 and granted *cert.* in both cases in October.²⁸ With clear implications for the Court's abortion jurisprudence, the cases drew heavy *amicus* participation from advocates on both sides of that conflict. For example, writing on behalf of the National Women's Health Network and Northwest Women's Law Center, Sylvia Law emphasized that the states of Washington and New York were defending their statutory bans on assisted suicide by arguing that "the Constitution protects only those rights specifically recognized when the Constitution or the Fourteenth Amendment was adopted." From Law's angle, "[t]his wooden, historically frozen concept of constitutionally protected liberty poses a particular threat to women (among other historically oppressed populations) because, both in 1789 and in 1868, our Constitution and laws pervasively and explicitly denied women personal,

²⁵ *Vacco v. Quill*, 80 F.3d 716 (2nd Cir. 1996).

²⁶ *Vacco v. Quill*, 80 F.3d 716, 723-5 (2nd Cir. 1996).

²⁷ *Vacco v. Quill*, 80 F.3d 716, 725-31 (2nd Cir. 1996).

²⁸ *Washington v. Glucksberg*, 517 U.S. 1241 (1996), cert. granted, 518 U.S. 1057 (1996); *Vacco v. Quill*, 518 U.S. 1055 (1996).

civil and political rights.”²⁹ Likewise, in a brief for the Center for Reproductive Law and Policy, Janet Benshoof and Kathryn Kolbert argued that Reinhardt’s holding in the Washington case was correct, but that even if the Court were to reverse it, the justices should leave their abortion precedents undisturbed.

The Clinton administration likewise sought to distinguish the two contexts, with Acting Solicitor General Walter Dellinger arguing that “[t]he right to choose an abortion implicates a constellation of liberty and equality rights of fundamental importance that are not implicated here.” Dellinger’s brief acknowledged that “[a] competent, terminally ill adult has a constitutionally cognizable liberty interest in avoiding the kind of suffering experienced by the plaintiffs in this case,” but nonetheless concluded that “[o]verriding state interests justify the State’s decision to ban physicians from prescribing lethal medication.”³⁰ In similar fashion, a brief on behalf of 50 bioethics professors urged the Court to reverse the holdings below while “[e]xplicitly recogniz[ing] that rejection of a right to physician assistance in committing suicide in no way affects a woman’s constitutional right to determine whether or not to terminate her pregnancy.”³¹

On the other side, a variety of leading anti-abortion litigators joined the fray as well. On behalf of the American Center for Law & Justice, Jay Sekulow argued that a decision extending *Casey* to include a constitutional right to die “would lead to claims of right to use drugs, and to engage in polygamy, fornication, adultery, divorce, sodomy, bestiality, and consensual sadism.

²⁹ Brief for the National Women’s Health Network and Northwest Women’s Law Center as *Amici Curiae* in Support of Respondents, *Vacco v. Quill* and *Washington v. Glucksberg* (December 10, 1996), 6-7.

³⁰ Brief for the United States as *Amicus Curiae* Supporting Petitioners, *Washington v. Glucksberg* (November 12, 1996), 11, 13.

³¹ Brief for Bioethics Professors as *Amicus Curiae* Supporting Petitioners, *Vacco v. Quill* and *Washington v. Glucksberg* (November 12, 1996), 48.

If a person has a constitutional right to have somebody kill him, how can he not have a constitutional right to allow somebody to inflict pain and injury on him?" These claims would lead, in turn, "to one of two results: either the courts will require states to approve of much conduct the states may reasonably desire to prohibit as harmful, in effect imposing a constitutionally mandated moral philosophy on the states; or the courts will arbitrarily pick and choose which activities the states may prohibit, and which activities the states must allow. In effect, the courts will become superlegislatures passing on the wisdom of state laws." As such, the "Court should either overrule *Casey* or decline to extend *Casey's* definition of liberty" to this new context.³² Likewise, on behalf of Senator Orrin Hatch and Representatives Henry Hyde and Charles Canady, Michael McConnell argued that "[e]ven apart from the specifics of constitutional doctrine, there is every reason for courts to be wary about overturning duly enacted legislation on the basis of untried and uncertain moral and philosophical arguments, where the result is bereft of support in directly relevant constitutional text or in national experience." Like the Ninth Circuit dissenters, McConnell insisted that the Court had reaffirmed *Roe* in *Casey* solely because it was an established precedent, and hence that there was no justification for extending its logic to new contexts. Indeed, "[t]he abortion cases should serve as a cautionary note rather than a precedent."³³

From one angle, these *amicus* briefs in support of the states of Washington and New York represented a straightforward effort by pro-life advocates to discourage a new round of

³² Brief *Amicus Curiae* of the American Center for Law & Justice Supporting Petitioners, *Vacco v. Quill* and *Washington v. Glucksberg* (November 12, 1996), 6-7.

³³ Brief of Senator Orrin Hatch, Chairman of the Senate Judiciary Committee; Representative Henry Hyde, Chairman of the House Judiciary Committee; and Representative Charles Canady, Chairman of the Subcommittee on the Constitution of the House Judiciary Committee, as *Amici Curiae* in Support of the Petitioners, *Vacco v. Quill* and *Washington v. Glucksberg* (November 12, 1996), 23-24, 46.

judicial legislation akin to that which had been sparked by *Roe v. Wade*. But it is clear that their chief concern was a substantive one—i.e., that assisted suicide should not be legalized—and that they were only secondarily concerned with whether policy in this realm was settled by judges or legislators. Longtime anti-abortion litigator James Bopp, Jr., affiliated with the National Right to Life Committee, filed fully four separate *amicus* briefs urging reversal, but one of them was filed on behalf of several health care providers and patients with terminal illnesses whom he was also representing in a then-pending effort to block implementation of Oregon's 1994 Death with Dignity Act. In the *Glucksberg* briefs, Bopp argued that the federal courts could not legitimately legalize assisted suicide, but in the Oregon briefs, he argued that the electorate could not legitimately do so either.

When the Washington and New York decisions came down in June 1997, SCOTUS rejected the constitutional challenges to both statutes, thus returning the issue to the political process.³⁴ With the litigation avenue closed off, right-to-die advocates relied almost exclusively on legislative and electoral efforts for the next decade. These efforts achieved limited success, which eventually led the advocates to return to court,³⁵ but even where they did have some success with democratic lawmaking channels, they inevitably faced legal challenges from the right.

The Oregon story is particularly instructive. As we noted above, the state's voters became the first to legalize assisted suicide when they enacted Measure 16, also known as the Death with Dignity Act, in November 1994. Learning from the earlier unsuccessful initiative

³⁴ *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).

³⁵ See, for example, *Baxter v. State of Montana*, 354 Mont. 234 (Mont. 2009); *Blick v. Office of the Division of Criminal Justice* (Super. Ct., Dist. of Hartford 2010), available on line, <http://www.compassionandchoices.org//documents/memorandum-%20of-dismissal-decision.pdf>.

campaigns in California and Washington, the drafters of Measure 16 restricted its scope by providing for mandatory waiting periods, requiring participating doctors to be licensed within the state, and requiring patients to be Oregon residents (Hillyard and Dombrink 2001: 69). In response, a group of doctors, patients, and residential care facilities who objected to the law filed an immediate constitutional challenge. Represented by Bopp, these opponents of assisted suicide persuaded Federal District Judge Michael R. Hogan to enjoin the law before it took effect.³⁶ A Ninth Circuit panel eventually reversed this decision, but not before the litigation had delayed implementation of the Oregon Death with Dignity Act for several years.³⁷

Plaintiffs alleged that Measure 16 violated the equal protection and due process clauses, statutory and First Amendment rights to freedom of religious exercise and association, and the Americans with Disabilities Act.³⁸ Chief Judge Hogan resolved the issue solely on equal protection grounds, at which point the other claims dropped out of the litigation. Hogan adopted a rational basis standard of review and accepted that the state had some legitimate interests in adopting Measure 16, but held that “the procedures designed to differentiate between the competent and incompetent” were insufficient.³⁹ In particular, Hogan was concerned that the procedural safeguards provided in the assisted suicide law were less robust than those that applied to the civil commitment of mentally ill persons. These inadequate procedures were particularly troubling because “[i]t is undisputed that one of the factors that motivates suicide is depression.” Terminally ill patients “are susceptible to even subtle suggestions that reinforce” feelings of guilt and worthlessness, and yet Measure 16 did not

³⁶ *Lee v. Oregon*, 891 F. Supp. 1429 (D. Or. 1995).

³⁷ *Lee v. Oregon*, 107 F.3d 1382 (9th Cir. 1997).

³⁸ *Lee*, 891 F.Supp. at 1431.

³⁹ *Lee*, 891 F.Supp. at 1434.

require a specialized mental health expert to examine a patient before the prescription was issued.⁴⁰ Relatedly, the medical standard of care adopted by Measure 16 was “a subjective ‘good faith’ standard” rather than the stronger usual standard of “objective reasonableness, according to professional standards.”⁴¹ In Hogan’s view, these limited procedures failed to meet the state’s legitimate interest in ensuring that only competent terminally ill patients commit suicide because “Measure 16 singles out terminally ill persons who want to commit suicide and excludes them from protections of Oregon laws that apply to others.”⁴² Hogan issued a permanent injunction against Measure 16.

On appeal before the Ninth Circuit, Bopp constrained his argument to the narrow grounds adopted by Hogan. He framed Measure 16 as creating “an exception—applicable only to persons diagnosed as having a terminal disease—to the criminal and civil presumptions and protections against self-harm and assisted suicide safeguarding all other persons in Oregon.”⁴³ Before the District Court, plaintiffs demonstrated “that no safeguards **at all** exist at the crucial time when the lethal prescription is ingested” and that “a request for assistance in suicide nearly always results from a treatable psychiatric condition ... which renders them incapable of rational decisionmaking ... After treatment for the psychiatric condition persons invariably no longer request suicide.”⁴⁴ These facts were drawn from the affidavits of various doctors and professionals asserting, among other things, that there is no accurate method of defining a terminal disease; that non-specialists have trouble diagnosing depression, which is a leading

⁴⁰ *Lee*, 891 F.Supp. at 1435.

⁴¹ *Lee*, 891 F.Supp. at 1436, 1437.

⁴² *Lee*, 891 F.Supp. at 1438.

⁴³ Appellees’ Brief & Cross Appellants’ Brief at 3 (January 24, 1996).

⁴⁴ Appellees’ Brief, at 3-4 (emphasis in original).

cause of suicide; that treating depression takes longer than the 15-day waiting period adopted by Measure 16; and that the drugs prescribed to facilitate suicide are unreliable in causing actual death.⁴⁵ As noted, Bopp's brief tracked Hogan's opinion closely in arguing that "Measure 16 is founded on the erroneous presupposition that it is 'normal' for terminally ill persons to seek suicide." Because such persons in fact "generally seek suicide only when suffering from depression [, the Act] ... is irrational for being based on unscientific stereotypes and erroneous presumptions."⁴⁶ While an "imperfect fit" between the state interest and the legal means may be justifiable in "economic and commercial matters," Bopp concluded, such a lenient version of rational basis is unacceptable in matters of life and death.⁴⁷

The Ninth Circuit avoided Bopp's argument and held that his clients lacked standing to bring their claims. The court found that their threatened injuries were too speculative; simply "because the asserted injury is the threat of death does not mean that the plaintiff is relieved from the requirement of asserting some significant possibility of injury."⁴⁸ Though ultimately unsuccessful, the right-to-life litigators were able to delay implementation of Measure 16 for more than two years. This delay also allowed time for a legislative repeal effort to develop.

Because the right-to-life advocates, like their right-to-die counterparts, were engaged in a campaign of multidimensional advocacy, they responded to this defeat in court by pursuing other available avenues to block enforcement of the Death with Dignity Act. Under Oregon law, the legislature is empowered to repeal statutes that had been enacted via ballot initiative. Led by Catholic groups that had provided 59% of the funding to fight Measure 16 initially,

⁴⁵ Appellees' Brief, at 7-17.

⁴⁶ Appellees' Brief, at 23.

⁴⁷ Appellees' Brief, at 34.

⁴⁸ *Lee v. Oregon*, 107 F.3d 1382, 1390-91 (9th Cir., 1997).

opponents of assisted suicide urged the legislature to intervene in 1997 (Ball 2012: 132, 138).

Three images were central to the repeal effort: “the needle, the bag, and the Netherlands” (Hillyard and Dombrink 2001: 99). The leading state newspaper, the Oregonian, popularized the idea that studies in the Netherlands found that drugs in suicide cases had a 25% failure rate, though Dutch researchers claimed this was an intentional distortion of their findings to support the paper’s strong opposition to assisted suicide (Hillyard and Dombrink 2001: 101-2, 108-9). Regardless of the accuracy of the claim, the high failure rate figured prominently in the repeal effort, with the image of “the needle” referring to doctors having to stand by and inject more drugs to finish the job (something that Measure 16 prohibited). The image of “the bag” was displayed by one Republican senator who suggested that after the drugs failed, suffocation would ultimately be necessary (Hillyard and Dombrink 2001: 100). When Governor John Kitzhaber threatened to veto a direct repeal, the legislative opponents of assisted suicide proposed returning the issue to the polls instead. This effort succeeded in the legislature, marking the first time in Oregon history that “a ballot measure [had] been sent back to voters in its exact form” as previously passed (Hillyard and Dombrink 2001: 103). The public, however, was strongly opposed; a February 1997 poll found that 80% of Oregonians opposed ever returning a successful ballot proposal to the people, and even 55% of those who voted against Measure 16 opposed returning it to the people (Hillyard and Dombrink 2001: 102). The repeal campaign, though still dominated by Catholic and religious pro-life organizers, focused on the “clinical issues like failure rates and increased suffering” of assisted suicide rather than the moral arguments in strongly secular Oregon (Hillyard and Dombrink 2001: 105). In November 1997, Oregon voters rejected Measure 51 40%-60%, a vote that was significantly less close than

the initial passage of Measure 16. Having failed to invalidate the measure through both judicial and democratic politics, opponents sought to shift venues yet again by calling on the federal government to preempt the state law.

After the failure of the repeal initiative made it clear that the Death with Dignity law would finally take effect, Senator Orrin Hatch and Representative Henry Hyde wrote to the director of the federal Drug Enforcement Administration (DEA) requesting prosecution of (or other administrative sanctions against) Oregon physicians who participate in assisted suicides. The DEA considered the request, but Attorney General Janet Reno subsequently concluded that federal law enforcement agencies were not authorized to “displace the states as the primary regulators of the medical profession, or to override a state’s determination as to what constitutes legitimate medical practice.”⁴⁹ Pro-life members introduced legislation in the 105th and 106th Congresses that would have granted such authorization, and following the 2000 elections, one of the supporters of this legislation replaced Reno as Attorney General. Early in Bush’s first term, Attorney General John Ashcroft announced a new interpretation of the federal Controlled Substances Act (CSA), under which doctors and pharmacists would be prohibited from prescribing or dispensing controlled substances to assist with suicide, notwithstanding Oregon law.

Joined by several medical professionals and terminally ill state residents, the state challenged the Attorney General’s interpretation, and the Ninth Circuit sided with the state in May 2004.⁵⁰ When SCOTUS granted *cert.* the following February, Bopp “announced . . . that he would coordinate ‘an all-out legal effort in support of the Ashcroft directive’” (Greenhouse

⁴⁹ *Gonzales v. Oregon*, 546 U.S. 243, 252-3 (2006).

⁵⁰ *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004).

2005). Despite this effort, when the decision came down in January 2006, Justice Kennedy wrote for a six-justice majority in affirming the Ninth Circuit. Among other things, Kennedy objected to the Attorney General's claim of "extraordinary authority," noting that "[t]he structure of the CSA . . . conveys [congressional] unwillingness to cede medical judgments to an Executive official who lacks medical expertise." He held further that the CSA cannot reasonably be read as prohibiting physician-assisted suicide, as "the statute manifests no intent to regulate the practice of medicine generally," and "[t]o read prescriptions for assisted suicide as constituting 'drug abuse' under the CSA is discordant with the phrase's consistent use throughout the statute, not to mention its ordinary meaning." Finally, appealing to "the background principles of our federal system," Kennedy held that the federal government could not displace Oregon's detailed regulatory scheme without a clearer statement from Congress of its intention to do so.⁵¹

In sum, a policy conflict that began with an explicit effort by assisted suicide advocates to pursue their goals through the democratic process nonetheless wound up in court—first because their opponents filed suit on behalf of a constitutional right to life and second because they themselves had to resort to litigation to prevent federal interference with the enforcement of the policy that they had enacted via state democratic channels.

The Oregon story is not unique. When assisted suicide supporters launched a similar ballot initiative campaign in neighboring Washington, the Coalition Against Assisted Suicide filed a pre-election challenge alleging that the ballot language and the state's official voters pamphlet were misleading. A state trial judge rejected this challenge in February 2008 and the

⁵¹ *Gonzales v. Oregon*, 546 U.S. 243, 262, 266, 270, 274 (2006).

Death with Dignity Act was enacted as Initiative 1000 the following November. Likewise when right-to-die advocates launched an initiative campaign in Massachusetts, seeking placement on the November 2012 ballot, opponents filed a pre-election challenge to the initiative language. The legal challenge was unsuccessful, but the initiative was defeated at the polls.⁵²

Unilateral Disarmament and Constitutional Politics

Backlash theorists regularly advise social movements to abandon the courts in favor of democratic politics on the grounds that legislative resolution is less likely to anger opponents who have had their voices heard in the deliberative process and that legislators are more likely than judges to craft broadly acceptable compromises. What these arguments ignore is that abandoning the courts does not remove judicial politics from the process; it simply leaves the legal options to their opponents, uncontested. Unilateral disarmament by social movements means that their opponents are able to frame the constitutional debate over policy options. Opponents may mobilize courts as simply another veto point against social change, but judicial decisions have broader effects. Litigators are probably happy to accept a simple veto but their more fundamental goal is to have the courts accept their constitutional framing, to normalize their understanding of the issue to not only roll back changes to the status quo (however

⁵² Kelly v. Coakley, SJ-2012-0216, docketed here, http://www.mass.gov/judicial/courts-and-justice/appellatecourts.org/search_number.php?dno=SJ-2012-0216&get=Search.

achieved) but to ensure that future changes are more difficult. The experience of pro-life litigation in New York and Oregon illustrates the dangers that unilateral disarmament may have for social movement groups.

Contrary to the simplistic picture of rights litigation, groups advocating for reform of abortion and suicide laws did not abandon democratic politics and in fact achieved significant democratic victories. Pro-life litigation in both New York and Oregon demonstrates the danger of abandoning judicial politics to the opposition. Had the left-liberal rights advocates done so, they would have left their gains from democratic politics open to legal challenge from the opposition. While Byrn's legal framing may not have been convincing in the face of the extensive pro-choice legal development pre-*Roe*, it still had influence on some judges. Similarly, Chief Judge Hogan was convinced by the challenges to Oregon's law as dangerous. If we imagine the world backlash advocates call for, then pro-life litigation would have a more open field since it would have the advantage of framing the legal arguments without the competing constitutional logics offered by abortion and right-to-die advocates. Had the U.S. Supreme Court not resolved (or at least attempted to resolve) the abortion debate, the history of judicial federalism shows the likely course of alternative events. Assuming that abortion rights advocates regained momentum in democratic politics, abortion opponents would have turned to state constitutional claims to attack abortion liberalization or legalization laws as other litigants did after failing to achieve change at the federal level (see Williams 2009: 113-34).

Pro-life abortion litigation would have received further support from the 1975 *Abortion I*⁵³ decision from the German Constitutional Court, which required the state to criminalize

⁵³ *Abortion I Case* (1975), 39 BVerfGE 1.

abortion, emphasizing the German constitutional right to life as a necessary “reaction to the ‘destruction of life unworthy to live,’ the ‘final solution,’ and the ‘liquidations’ that the National Socialist regime carried out as governmental measures” (Kommers 1997: 337). The German Court accepted part of Byrn’s key claims: “Life in the sense of the developmental existence of a human individual begins, according to established biological-physiological findings, on the fourteenth day after conception ... The developmental process thus begun is a continuous one which manifests no sharp demarcation and does not permit any precise delimitation of the various developmental stages of the human life” (Kommers 1997: 337). While the decision still allowed a significant loophole for abortion availability (Eberle 2002: 172), the strong legal condemnation would have provided powerful persuasive language for pro-life litigators in a world without *Roe*. Similarly, in 1983, Ireland adopted its Eighth Amendment prohibiting abortion in all cases except where the mother’s life was in danger.⁵⁴ This provision became the basis for an injunction against a 14-year-old rape victim prohibiting her from traveling to England for an abortion; the injunction was reversed only when the Irish Supreme Court held that the girl’s suicidal feelings amounted to a threat to her life (Kingston, Whelan, and Bacik 1997: 6-19).⁵⁵

Had abortion rights supporters in the United States given up on judicial politics, the issue would still have resulted in litigation but this time framed by their pro-life opponents. Those opponents would over time have gathered more compelling international precedent to support their case. It is reasonable to assume, given the diversity in judicial ideology across the

⁵⁴ Constitution of Ireland Art.40.3.3: “The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.”

⁵⁵ *Attorney General v. X* [1992] 1 I.R. 1.

fifty states, they would have won some victories in line with Judge Burke's dissent in the Byrn case. This would likely have led to different criminal abortion regimes in various states, and perhaps also to conflicting interpretations of the very definition of a constitutional person. Given the common pro-life ideology shared by abortion and suicide opponents, such a state of affairs would likely have altered the assisted suicide debate in significant ways as well. Judicial decisions, even confined to the state level, declaring fetal personhood and a broad right to life would likely have fueled the pro-life opposition to suicide and provided stronger arguments than the relatively mild rational basis fitness claims that Bopp was forced to advance.

On contentious aspects of public policy, advocacy organizations should take warnings of court-inspired backlash with a grain of salt. Counter-mobilization is a natural aspect of any major social change and may be unavoidable in most cases. There is no good reason to suspect that opponents are more likely to accept change that comes about through democratic rather than judicial politics and, in fact, the history sketched out here shows that both sides of the debate utilized multidimensional advocacy in multiple venues and, at least in the suicide case, at multiple levels of government. Advising advocates seeking to change the status quo that they should unilaterally abandon judicial politics is like advising one army to lay down its guns while the other keeps shooting. It is perhaps unsurprising that social movements have ignored this advice for so long.

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