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EDELIN: THE REMAKING OF THE HEADLINE ABORTION TRIAL

MARY ZIEGLER*

INTRODUCTION

When did we leave the era of headline abortion trials behind us? Conventional historical accounts suggest that high-profile criminal trials were a defining feature of the legal and political landscape before *Roe*.[1] Although relatively infrequent before *Roe*, blockbuster trials had tremendous symbolic importance, offering evidence of when abortion would be publicly denounced rather than privately tolerated.[2] Notorious abortion trials fell into several different categories: soap operas involving complex social entanglements and prosecutions of practitioners who were celebrities in their own right.[3]

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1. For discussion of abortion trials, see generally LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1867–1973, at 113–93 (1997); JOHANNA SCHOEN, CHOICE AND COERCION: BIRTH CONTROL, STERILIZATION, AND ABORTION IN PUBLIC HEALTH AND WELFARE 139–97 (Gend. & Am. Culture Ser., 2005); Rickie Solinger, *Extreme Danger: Women Abortionists and Their Clients Before* Roe v. Wade, *in* NOT JUNE CLEAVER: WOMEN IN POST-WAR AMERICA, 1945–1960, at 335 (Critical Perspectives on the Past Ser., Joanne Meyerowitz ed., 1994); Rickie Solinger, *Pregnancy and Power Before* Roe v. Wade, 1950–1970, *in* ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950–2000, at 15, 17–20 (Rickie Solinger ed., 1998) [hereinafter Solinger, *Pregnancy and Power*].

2. *See generally* REAGAN, *supra* note 1, at 1–18 (explaining the inconsistent and culturally contingent enforcement of criminal prohibitions on abortion); SCHOEN, *supra* note 1, at 163–64 (describing the inconsistency of abortion prosecutions).

3. For examples of these different types of celebrity abortion trials, see *Find 2 Guilty in Conspiracy Abortion Trial*, CHI. DAILY TRIB., Dec. 2, 1949, at 2 (prosecution of recognized practitioner with ex-police officer as co-defendant in separate trial); *Marino Acquitted in Fatal Abortion*, N.Y. TIMES, Oct. 23, 1942, at 23 (detailing prosecution of defendant active in community and a captain in the Army Medical Corps); David H. Orro, *Physician Gets 15-Year Sentence for Murder*, CHI. DEFENDER, Jan. 27, 1940, at 2 (describing abortion trial of prominent doctor also involved in the murder of a family friend); *Two Women Go on Trial Today in Abortion Case*, CHI. DAILY TRIB., Oct. 14, 1941, at 8 [hereinafter *Two Women*] (describing the connection between an investigation into an abortion ring and a murder, two suicides, and the dismissal of two assistant state's attorneys).

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Roe v. Wade is thought to have put an end to the era of the high-profile abortion trial.[4] In announcing a constitutional right to abortion, *Roe* is seen to have decriminalized abortion, setting in motion a new debate about how, when, and why abortion could be restricted.[5]

However, the conventional historical account of the role of criminal trials in abortion law is fundamentally incomplete. *Roe* did not end the era of blockbuster criminal trials, but the decision changed what was at stake in them. Centrally, in the 1974–1975 trial of Dr. Kenneth Edelin, a Boston physician convicted of manslaughter after performing an abortion, advocacy groups, politicians, and the press debated what *Roe* would actually mean in practice.[6] As the Edelin trial showed, blockbuster criminal trials no longer served to illustrate when abortion was a crime but instead highlighted what protections abortion rights provided and to whom they belonged.

There is a good deal at stake in understanding the history of *Edelin* and other headline abortion trials after *Roe*.[7] Conventional histories cite *Roe*'s decriminalization of abortion in highlighting the Supreme Court's power and relevance in the abortion debate.[8] In particular, by focusing on

4. REAGAN, *supra* note 1, at 245; *see also* Jack M. Balkin, Roe v. Wade*: An Engine of Controversy*, *in* WHAT *ROE V. WADE* SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 3 (Jack M. Balkin ed., 2004) (discussing *Roe*'s action to strike down of most of the abortion laws of the states); LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 140 (1990) (noting that *Roe* decriminalized abortion under the laws of most states).

5. *See supra* note 4 and accompanying text.

6. For an introduction to the trial of Dr. Edelin, see Peter Stoler, *A Case Célèbre*, TIME MAG., June 5, 1978, at 93 (reviewing WILLIAM A. NOLEN, M.D., THE BABY IN THE BOTTLE (1978)).

7. There were other trials of physicians in the period. *See, e.g.*, Dexter Duggan, *Doctor Accused in Strangling Death of Baby Born Alive After An Abortion*, NAT'L RIGHT TO LIFE NEWS, May 1977, at 1 (detailing the trial of Dr. William Baxter Waddill Jr. for the murder of an allegedly viable fetus). However, as we shall see, the *Edelin* trial attracted much more press attention. Moreover, as I will argue, *Edelin* represented a more direct challenge to conventional interpretations of *Roe*. Consequently, understanding *Edelin* is crucial to any account of headline abortion trials in the period.

8. In summarizing critical views of *Roe* on this subject, Edward Keynes and Randall Miller write that, in *Roe*, the Supreme Court is argued to have "abandoned self-restraint, usurped the legislative powers of Congress and the states, and exceeded the constitutional scope of judicial power." EDWARD KEYNES & RANDALL K. MILLER, THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION 246 (1989); *see also* Donald P. Kommers, *American Courts and Democracy: A Comparative Perspective*, *in* The JUDICIAL BRANCH 200, 210 (Kermit L. Hall & Kevin T. McGuire eds., Insts. Of Am. Democracy Ser., 2005); George Will, *Judicial Power and Abortion Politics*, *in* GREAT CASES IN CONSTITUTIONAL LAW 192, 193 (Robert P. George ed., 2000) (describing the court's decision as "mow[ing] down the abortion laws of all fifty states").

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decriminalization, critics of the opinion attack the *Roe* Court's arrogance, overreaching, or political obtuseness.[9]

However, as the history of the Edelin trial suggests, the decriminalization of most abortions and the definition of abortion rights were not accomplished by court edict. The decriminalization of routine abortions occurred only after debate and negotiation between advocacy groups. Organizations on both sides of the issue participated in and publicized the *Edelin* trial. Because of the media attention it attracted, *Edelin* promised to be a platform for organizations wishing to promote their own understandings of *Roe*, arguments about abortion, and characterizations of those on the other side of the issue. But *Edelin* proved that the headline trial could be a double-edged sword for advocacy groups. Neither proponents nor opponents of *Roe* could control how the media presented *Edelin* or how the public understood it. Because of this, groups like the Planned Parenthood Federation of America (PPFA), the American Civil Liberties Union (ACLU), and the National Right to Life Committee (NRLC) became disenchanted with *Edelin* and trials like it.

These groups had to lose interest in headline trials like *Edelin* before they became a thing of the past. Understanding the history of the *Edelin* trial shows that concern about *Roe*'s overreaching may be overstated. If the story of *Roe* is a cautionary tale, that story is not primarily one about the dangers of judicial power.

The Article proceeds in three parts. Part I examines the conventional historical account of *Roe*'s role in eliminating criminal abortion trials. Part II uses the prominent *Edelin* trial to challenge this account. This section shows that, after *Roe*, criminal abortion trials no longer focused on when abortion prohibitions would be enforced but instead on what abortion rights would mean. Part III briefly concludes.

I. THE BEGINNING OF THE END

What do we mean when we say that *Roe v. Wade* decriminalized abortion? For some critics, the answer is that *Roe* ended an era of abortion trials.[10] Headline prosecutions have long been considered the hallmark of the era

9. For examples of this account of *Roe*, see RUTH COLKER, ABORTION AND DIALOGUE: PRO-CHOICE, PRO-LIFE, AND AMERICAN LAW 115 (1992) (arguing that *Roe* prohibited any societal or congressional dialogue about abortion); FREDERICK P. LEWIS, THE CONTEXT OF JUDICIAL ACTIVISM: THE ENDURANCE OF THE WARREN COURT LEGACY IN A CONSERVATIVE AGE 50 (1999) (describing *Roe* as a sweeping and unanticipated decision); Cass R. Sunstein, *Judges and Democracy: The Changing Role of the United States Supreme Court*, *in* THE JUDICIAL BRANCH, *supra* note 8, at 32, 56 (describing criticisms that contend "[*Roe*] is more like *Dred Scott*: an unsuccessful and morally abhorrent effort . . . .").

10. *See, e.g.*, *supra* note 4 and accompanying text.

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before *Roe*.[11] In the period before the Supreme Court's decision, all abortions were criminal, but in practice, criminal prosecutions were sporadic.[12]

Perhaps the most famous headline abortion trial of all was one that took place before the end of the nineteenth century. The trial involved the notorious New York abortion practitioner: Madame Restell (an assumed name).[13] Restell's various trials made headlines because of the luxurious lifestyle she appeared to lead. She favored expensive jewelry and made use of elaborate transoms when travelling to court.[14] On one occasion, while awaiting trial, her accommodations in jail were so opulent that several prison officials were almost fired.[15] Ultimately, after Anthony Comstock had successfully pursued Restell and made her prosecution a part of his effort to restore morals regulations in New York, she cut her throat to avoid a conviction.[16] The gory details notwithstanding, each of her trials made headlines because Madame Restell was a headline in her own right.[17] As the press put it at the time, she was "the wickedest woman in New York."[18]

Though there were some variations in the general character of abortion prosecutions before *Roe*, Restell's prosecution was typical of the state of headline abortion trials in the nineteenth century. After the criminalization of abortion in many states, trials proceeded according to what Lawrence Friedman has called the "Victorian compromise"[19]: only a handful of abortion patients or providers were prosecuted, and often, only the most egregious offenders were pursued.[20] As Johanna Schoen has demonstrated in her studies of abortion in North Carolina, the target of abortion prosecutions changed over time, as prosecutors focused first on women's sexual partners, then on abortion providers, and finally, at least to some extent, on women themselves.[21]

11. *See generally* REAGAN, *supra* note 1, at 113–93.

12. Solinger, *Pregnancy and Power*, *supra* note 1, at 17.

13. Geoffrey C. Ward, *Close-Mouthed but Flamboyant*, N.Y. TIMES, May 15, 1988, at BR25 (reviewing CLIFFORD BROWDER, THE WICKEDEST WOMAN IN NEW YORK: MADAME RESTELL, THE ABORTIONIST (1988)).

14. *Id.*

15. *Id.*

16. *Id.* *See also* NICOLA BEISEL, IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA 13, 26 (Princeton Studies in Am. Politics Ser., 1997) (describing how in the nineteenth century, Anthony Comstock became renowned as a crusader for "morals laws" on matters from pornography to birth control).

17. Ward, *supra* note 13.

18. *Id*.

19. The "Victorian compromise" is an idea that certain vices were inevitably part of society, and authorities "accepted them as part of urban life." LAWRENCE M. FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 66–67 (2007).

20. *See* Solinger, *Pregnancy and Power*, *supra* note 1, at 17–18.

21. *See* SCHOEN, *supra* note 1, at 156, 163.

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Although there was a general crackdown on black-market abortions in the 1940s and 1950s, abortion prosecutions remained rare in the decades before *Roe*.[22]

Abortion trials across these periods became famous for different reasons. In some cases, abortion trials revealed titillating details about the "dark side" of respectable society. For example, in New York in 1871, the press was riveted by the trial of Dr. Anne Byrnes, a well-thought-of, older doctor accused of performing illicit abortions in her house, one of which killed a young woman named Mary Russell.[23] Years later, in Chicago in 1937, Dr. Morgan Turner, a prominent physician and candidate for public office, was charged with "murder by abortion" and made eligible for the death penalty.[24]

Other celebrity abortion trials gained notoriety because of the shocking details revealed at trial. Accused of murder by abortion in 1940, Dr. Ernest Martin, a well-known Chicago area physician, was accused of shooting a former client, Anna Balinski, post-mortem in order to cover up her death during an abortion procedure that he had performed.[25] The trial of Ada Martin (no relation) in 1941–1942 had elements of both soap opera and tragedy: the proceedings covered a murder, two suicides, and the dismissal of two Assistant State's Attorneys.[26]

A final kind of trial became famous because of a public sense that justice had been denied. For example, Dr. Lou Davis of Chicago, tried in 1937, had already been prosecuted and arrested seemingly innumerable times, but none of the accusations against her had yet led to a conviction.[27]

Roe itself is seen to have eliminated this kind of headline trial and to have transformed the relationship between abortion and the criminal law.[28] According to a conventional historical account, *Roe* dismantled the vast majority of criminal abortion laws in a single opinion.[29] Because of that opinion, women had unprecedented access to safe and legal abortion, primarily because practicing physicians could act without fear of liability. Writing in this vein, Jack M. Balkin has explained that "*Roe v. Wade* struck down the

22. *Id.* at 163–64.

23. *The Evil of the Age—The Trial of Mrs. Byrnes for Abortion*, N.Y. TIMES, Dec. 12, 1871, at 3.

24. *Pick Death Jury to Try Physician in Abortion Case*, CHI. DAILY TRIB., June 26, 1937, at 4.

25. Orro, *supra* note 3.

26. *Two Women*, *supra* note 3.

27. *See Woman Freed in 3D Abortion Murder Trial*, CHI. DAILY TRIB., Apr. 4, 1937, at 21; *see also Death in Chair Demanded for Woman Doctor*, CHI. DAILY TRIB., Mar. 13, 1936, at 4 (recounting a similar story).

28. *See, e.g.*, *supra* note 4 and accompanying text (describing *Roe*'s action to end abortion trials by decriminalizing the practice).

29. TRIBE, *supra* note 4, at 140.

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abortion laws of most states in a single opinion."[30] Political scientist Rosemary Nossiff agrees that "*Roe* decriminalized early abortions."[31] Laurence Tribe similarly has written that "[w]hat was an expensive and often brutal black market . . . would be transformed by *Roe* . . . ."[32] and prominent human rights attorney Janet Benshoof has stated that "*Roe v. Wade* has transformed abortion from a clandestine and dangerous ordeal into one of the safest medical procedures in the United States."[33] In her authoritative study of illegal abortion, Leslie Reagan succinctly summarizes this view: "*Roe v. Wade* and *Doe v. Bolton* ended an era of illegal abortion."[34]

It can be assumed that, because of *Roe*, the number of criminal abortion prosecutions dropped steeply.[35] However, *Roe* did not end headline abortion trials, at least not in the 1970s. As we shall see, there were a considerable number of abortion prosecutions in the years immediately after *Roe*, many of them involving midwives and other abortion practitioners without a medical license. *Roe* itself permitted states to criminalize abortions performed by non-physicians.[36] The Court explained: "The State may define the term 'physician' . . . to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined."[37]

For example, Verdell Wright, a Florida nurse, was successfully convicted of "unlawful termination of a pregnancy resulting in [a] woman's death" after her patient died.[38] Betty Norflett, a New Jersey midwife, attempted two abortion procedures on a seventeen-year-old woman, ultimately leading to the woman's hospitalization and absence from school for two months.[39] Norflett was successfully prosecuted for performing an abortion without lawful justification, assault and battery, and contributing to the delinquency of a minor.[40] Mario Guerrieri, an Ohio layman, was convicted of possessing a

30. Balkin, *supra* note 4, at 3.

31. ROSEMARY NOSSIFF, BEFORE *ROE*: ABORTION POLICY IN THE STATES 143 (2001).

32. TRIBE, *supra* note 4, at 140.

33. Janet Benshoof, *The Legacy of* Roe v. Wade, *in* ABORTION: MORAL AND LEGAL PERSPECTIVE 35 (Jay L. Garfield & Patricia Hennessey eds., 1984).

34. REAGAN, *supra* note 1, at 245.

35. The availability of facilities providing abortions just a decade after *Roe* testifies to this fact: by 1982, for example, there were nearly 3,000 hospitals or freestanding clinics willing to provide abortions. JAMES RISEN & JUDY L. THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR 106 (1998).

36. Roe v. Wade, 410 U.S. 113, 165 (1973).

37. *Id.*

38. Wright v. State, 351 So. 2d 708, 710–11 (Fla. 1977).

39. State v. Norflett, 337 A.2d 609, 611–612 (N.J. 1975).

40. *Id.* at 611, 613, 620.

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device conventionally used to perform abortions.[41] For the most part, these prosecutions unfolded with little public scrutiny. The lack of media attention is easily explained: the prosecution of non-physicians seems to be clearly permissible under *Roe*.[42]

By contrast, the prosecution and conviction of Dr. Kenneth Edelin attracted significant attention in the courts, the media, and advocacy-group circles.[43] As *Time Magazine* put it, *Edelin* was certainly a "case célèbre."[44]

An African-American physician, Edelin was the Chief Resident in Obstetrics and Gynecology at Boston's City Hospital.[45] While performing an abortion of an approximately twenty- to twenty-eight-week-old fetus, Edelin ended the blood flow to the fetus and then waited three to five minutes before removing it from the mother's body.[46] Alleging that Edelin had killed a viable fetus, Boston prosecutors charged Edelin with manslaughter, arguing that the fetus was a legal person and would have been born alive but for Edelin's conduct.[47]

Edelin was clearly a headline trial: media representatives attended the trial daily.[48] Edelin himself frequently appeared on television and became something of a focus for those who supported *Roe*.[49] But before the trial began, Edelin had hardly been a celebrity. Nor were the facts of the case particularly titillating or unusual. Edelin routinely performed abortions at Boston's City Hospital.[50] The fetus might have been older, and the procedure

41. Guerrieri v. State, No. 73 C.A. 19, 1974 Ohio App. LEXIS 3899, at *2 (Ohio Ct. App. May 30, 1974).

42. *Roe*, 410 U.S. at 163–65 (describing other legal entities who could be subject to regulation and prosecution prior to *Roe*).

43. For a sample of news coverage of *Edelin*, see Monroe Anderson, *Pro-Life Groups Here Laud Edelin Decision*, CHI. TRIB., Feb. 16, 1975, at 3; *Defense Wins Test at Abortion Trial*, N.Y. TIMES, Jan. 14, 1975, at 49; Warren Leary, *Boston Doctors Brace Themselves for Right-to-Life Battle*, L.A. TIMES, Jun. 19, 1974, at A7; John P. MacKenzie, *Doctor Trial in Death of Fetus Opens*, WASH. POST, Jan. 11, 1975, at A1; Robert Reinhold, *Abortion Trial's Crucial Issue: When Does Life Begin?*, N.Y. TIMES, Jan. 12, 1975, at 34.

44. *See* Stoler, *supra* note 6, at 93.

45. *See Defense Wins Test at Abortion Trial*, *supra* note 43; MacKenzie, *supra* note 43; Reinhold, *supra* note 43.

46. *See* Reinhold, *supra* note 43.

47. Commonwealth v. Edelin, 359 N.E.2d 4, 5 (Mass. 1976); *see, e.g.*, Letter from Frank Susman to Robert Sunnen 2 (Feb. 3, 1975), *in* ACLU Papers, *Edelin v. Massachusetts* (on file with Mudd Library, Rare Books & Manuscripts Div., Princeton Univ.).

48. For a sample of the news coverage of the trial, see *supra* note 43 and accompanying text.

49. For a discussion of one such television appearance, see Letter from Ray White, Exec. Director, Nat'l Right to Life Committee, to Woody Frazier, Producer, Mike Douglas Show (Mar. 26, 1975) (on file with Gerald Ford Mem'l Library) [hereinafter Letter from Ray White to Woody Fraizer].

50. Reinhold, *supra* note 43.

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he used might have been somewhat atypical, but Edelin had simply performed an abortion. Why, then, did his case become a headline trial?

Edelin attracted headlines partly because the facts were banal and partly because Edelin's actions seemed to be protected by *Roe*. Unlike Verdell Wright and Betty Norflett, Edelin was a physician entitled to *Roe*'s protections.[51] Moreover, the fetus at issue was most likely twenty to twenty-eight weeks old, potentially too young to be viable under *Roe*.[52] The question was no longer whether abortion was criminal, for *Roe* had decided that question. Instead, as we shall see, the issue was what *Roe* actually meant—who the decision would protect and when.

The case also became famous because it represented an open challenge to *Roe*. On the most plausible reading of *Roe*, criminal prosecutions of doctors performing abortions were not permissible, especially when no explicit criminal prohibition was passed by a state to put doctors on notice.[53] *Edelin* raised the possibility that *Roe* could be defied or gutted.

The *Edelin* litigation was officially pursued by the Commonwealth of Massachusetts, but key antiabortion activists like Dr. Mildred Jefferson and Dr. Frederick Mecklenburg of the National Right to Life Committee (NRLC) sponsored, publicized, and participated in the case.[54] Jefferson and Mecklenburg had been leaders of the anti-abortion movement before *Roe*.[55] Jefferson was the first African-American woman to graduate from Harvard Medical School and had become something of a media darling in the antiabortion movement.[56] Mecklenburg, meanwhile, was a well-known Minnesota obstetrician and gynecologist who had promoted family planning, adoption, and other alternatives to abortion.[57]

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51. *See* Roe v. Wade, 410 U.S. 113, 163–164 (1973) (suggesting that states could not criminalize most abortions of non-viable fetuses performed by physicians); *see also supra* notes 38–40 and accompanying text (describing prosecutions against Wright and Norflett due to their participation in abortion actions as non-physicians).

52. *Roe*, 410 U.S. at 160 (explaining that fetuses achieved viability at twenty-four to twenty-eight weeks).

53. EILEEN L. MCDONAGH, BREAKING THE ABORTION DEADLOCK: FROM CHOICE TO CONSENT 92 (1996) (arguing that, among other things, *Roe* affirmed a woman's right "to kill the fetus at any stage of a medically abnormal pregnancy").

54. *See A Fighter for Right to Life*, EBONY, Apr. 1978, at 78, 92; Letter from Frank Susman to Robert Sunnen, *supra* note 47, at 4.

55. *A Fighter for Right to Life*, *supra* note 54, at 78; *Religion: The Anti-Abortion Campaign*, TIME, March 29, 1971, at 72, 73.

56. For media coverage of Jefferson in the period, see for example, *A Fighter for Right to Life*, *supra* note 54, at 78; Anne Chamberlain, *The City Politic: Running a Cool Campaign from a Small, Hot Kitchen*, N.Y. MAG., Mar. 29, 1976, at 9, 11.

57. *See* PENNSYLVANIANS FOR HUMAN LIFE, BIOGRAPHIES OF PERSONS ATTENDING CONVENTION OF NATIONAL IMPORTANCE IN RIGHT TO LIFE WORK (1972), *in* Am. Citizens Concerned for Life Papers (on file with Gerald Ford Mem'l Library). By late 1974, Mecklenburg

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As we shall see, the position taken by the Commonwealth of Massachusetts and the NRLC was that *Roe* was valid and that abortion rights were deserving of constitutional protection. However, these groups sought to identify abortion rights only as early-term procedures and to protect only women's rights to terminate a pregnancy.[58] According to prosecutors, abortion rights only permitted women to terminate pregnancies and give up personal responsibility for the well-being of fetuses.[59] In their view, abortion rights did not authorize physicians or women to harm fetuses.

For her part, Mildred Jefferson defined birth as the moment that the fetus was detached from the mother and had to "go on its own systems."[60] According to Jefferson, abortion rights only permitted women to terminate pregnancies and give up personal responsibility for the wellbeing of fetuses.[61] In her view, abortion rights did not authorize physicians or women to harm fetuses.

For his part, Frederick Mecklenburg identified the term "abortion" as "applying to procedures only prior to twenty weeks gestation."[62] He suggested that any later procedure was not an abortion and was, therefore, not subject to constitutional protection.[63] Mecklenburg thus recognized abortion rights, but argued that those rights did not permit anyone to kill a fetus.[64] In opposing a motion to dismiss, the Commonwealth summarized this position as follows:

> In *Roe v. Wade* the Court held *inter alia* that the "right to privacy. . . is broad enough to encompass a *woman's decision* whether or not to terminate her pregnancy." Nowhere did the Court state, or imply that his [sic] right of

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and his wife, Marjory, who was also a major antiabortion activist, had distanced themselves from the NRLC. *See* ARLENE DOYLE, DO YOU NEED PERMISSION TO SAVE AN UNBORN BABY? 9–11 (1977) (outlining the conflict between the Mecklenburgs and the NRLC leadership). However, the Mecklenburgs remained major players in the antiabortion community in the mid-1970s. *See* Letter from Marjory Mecklenburg to Minnesota Citizens Concerned for Life Board of Directors (Sep. 2, 1974), *in* Am. Citizens Concerned for Life Papers, *supra* (describing the Mecklenburgs' involvement in American Citizens Concerned for Life, a major group, in the mid-1970s).

58. *See* Affidavit of the Commonwealth Opposing the Defendant's Motion for an Order of Dismissal of the Indictment Under the Authority of *Commonwealth v. Brandano*, 1971 Mass. Adv. SW. 659, 663, at 49, Commonwealth v. Edelin, 359 N.E.2d 4 (1976) (No. 81823), *in* ACLU Papers, *Edelin v. Massachusetts*, *supra* note 47 (describing the idea that abortion rights did permit fetal killing) [hereinafter Affidavit of Commonwealth].

59. *Id.*

60. *Defense Wins Test at Abortion Trial*, *supra* note 43.

61. *Id.*

62. Letter from Frank Susman to Robert Sunnen, *supra* note 47, at 4.

63. *Id.*

64. *Id.*

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> personal privacy extended to permit anyone to terminate the life of the child, if a human being results from the termination of pregnancy.[65]

Edelin and his attorney, however, proposed that abortion rights concerned not only women and their decision to have an abortion, but also physicians' actions.[66] According to Edelin, abortion rights ensured that doctors could practice medicine according to the best of their abilities.[67] For example, in Edelin's proposed instructions to the jury, *Roe* and its companion case, *Doe v. Bolton*, were described as follows:

> [F]ollowing the decision in *Roe v. Wade* . . . . the decision as to whether to perform an abortion was one left entirely up to the putative mother and her physician and the decision as to how exactly to perform the abortion was one left entirely within the doctor's medical judgment . . . .[68]

II. DISENCHANTMENT WITH THE HEADLINE TRIAL

Edelin was a headline trial not only because it challenged the dominant definition of abortion rights, but also because it demonstrated that abortion-based convictions continued, *Roe* notwithstanding: the Boston jury convicted *Edelin* of manslaughter.[69] Although he received no prison time, his conviction set off a wave of debate.[70] Was it fair to prosecute a doctor for performing an abortion when the Supreme Court seemed to have legalized abortion? Did Edelin have adequate notice that his conduct was criminal? Was his conduct criminal or was it constitutionally protected? Editorials in major newspapers took a stand on the issue.[71]

Members of the antiabortion movement predicted that *Edelin* was a sign of things to come: more abortion prosecutions, more criminal trials, and more convictions.[72] Indeed, at the time the case was decided, activists like Dr.

65. Affidavit of the Commonwealth, *supra* note 58, at 49 (alterations in original) (internal citations omitted).

66. *See, e.g.*, Defendant's Requests for Instructions to the Jury, Commonwealth v. Edelin, 359 N.E.2d 4 (1976) (No. 81823), *in* ACLU Papers, *Edelin v. Massachusetts*, *supra* note 47.

67. *Id.*

68. *Id.*

69. *Edelin*, 359 N.E.2d at 11; *see also* Anderson, *supra* note 43 (reporting on the reaction to Edelin's conviction).

70. *Abortion Conviction of Boston Doctor Upset*, N.Y. TIMES, Dec. 18, 1976, at 1. On the controversy surrounding Edelin's conviction, see for example, Lawrence E. Altman, *Doctor Guilty in Death Of a Fetus in Abortion*, N.Y. TIMES, Feb. 16, 1975, at 1; Lawrence E. Altman, *Implications of Abortion Verdict*, N.Y. TIMES, Feb. 17, 1975, at 41; *Doctor, Convicted in Abortion, Charges Prejudice Barred Fair Trial in Boston*, N.Y. TIMES, Feb. 17, 1975, at 41 [hereinafter *Doctor Convicted*]; Editorial, *Abortion Error*, N.Y. TIMES, Feb. 19, 1975, at 31; John Kifner, *Abortion Foe Cites Role*, N.Y. TIMES, Feb. 17, 1975, at 41.

71. *See* Editorial, *Abortion Error*, *supra* note 70.

72. *See* Anderson, *supra* note 43.

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Joseph Scheidler, the executive director of the Illinois Right to Life Committee, believed that the outcome of the trial would shape the abortion debate in Congress and the Supreme Court.[73]

Edelin's conviction was ultimately overturned by the Massachusetts Supreme Judicial Court, which held that Edelin was not afforded adequate notice, that his conduct could be considered criminal, and that there was insufficient evidence of "recklessness" to make out a manslaughter claim.[74] However, *Edelin* could still have seemed like a victory for the antiabortion movement. A jury and trial judge had agreed with the movement's interpretation of *Roe*, as might future judges and juries.[75] Even the Supreme Judicial Court had not taken issue with the movement's interpretation of abortion rights.[76] For abortion opponents, then, *Edelin* might have presented a roadmap for future headline antiabortion trials.

Proponents of *Roe* might also have seen reason to participate in and publicize criminal trials like *Edelin*. In other contexts, like the campaign for a "human life" amendment to the Constitution, supporters of *Roe* had to address disturbing, often graphic images of abortion and fetal death.[77] The *Edelin* trial focused equally on seemingly draconian punishments doled out to physicians, many of whom could not be sure of when their conduct would be punished.[78]

Just as importantly, Edelin himself was a boon to the abortion rights movement. An African-American physician serving an African-American patient, Edelin publicly linked abortion with the needs and equality concerns of poor, non-white women.[79] Conversely, he accused those behind his prosecution of harboring racist, sexist, and sectarian biases.[80] Since before 1970, some supporters of legalized abortion had maintained ties with the population control movement, a collection of advocates concerned about rising birth rates in the United States and abroad.[81] Because some population controllers appeared to have eugenic or racist motives, supporters of legalized

73. *Id.* (describing Dr. Scheidler's work as the Executive Director of the Illinois Right to Life Committee).

74. *See Edelin*, 359 N.E.2d at 11, 18; *see also Abortion Conviction of Boston Doctor Upset*, *supra* note 70.

75. *See* Anderson, *supra* note 43.

76. *See Edelin*, 359 N.E.2d at 12–13. Though the Massachusetts Supreme Judicial Court expressed doubt about the "no right to kill" argument advanced by the NRLC, the court did not actually reject it. *Id.* at 17.

77. *See* Linda Charlton, *Start of Life Debated at Abortion Hearing*, N.Y. TIMES, May 21, 1974, at 33.

78. For coverage in this vein, see for example, Editorial, *Abortion Error*, *supra* note 70.

79. Reinhold, *supra* note 43 (explaining that Edelin was known for "his concern for indigent patients").

80. *Doctor Convicted*, *supra* note 70.

81. Mary Ziegler, *The Framing of a Right to Choose:* Roe v. Wade *and the Changing Debate on Abortion Law*, 27 LAW & HIST. REV. 281, 285 (2009).

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abortion had to defend themselves against charges of racism and race genocide.[82] Edelin's case and subsequent media tour buttressed abortion rights claims that it was *Roe*'s opponents, not its proponents, who were the ones discriminating on the basis of race.

Nonetheless, *Edelin* proved to be the last headline abortion trial of its kind. As we shall see, the Supreme Court was not solely responsible for this state of affairs. The era of headline abortion trials ended not simply because the Court exercised its vast decriminalization powers. An end to such trials also required that the promotion or publicizing of such trials become politically unappealing to advocacy groups on either side of the debate.

Headline trials like *Edelin* had been appealing to advocacy groups largely because of the public attention they generated. A trial like *Edelin* raised the salience of the abortion issue and offered activists a platform for publicizing their views and the accusations they leveled against their opponents, but it was the very same publicity that made headline trials like *Edelin* dangerous. Advocates could not control how the media presented *Edelin* or how the public would respond to the coverage. Thus, the *Edelin* trial proved to be a double-edged sword, winning attention for a group but often generating press that did more harm than good. For this reason, advocacy groups lost interest in the headline abortion trial.

This point becomes clear when we study the effects of *Edelin* on three of the major players in the abortion debate after *Roe*: the Planned Parenthood Federation of America (PPFA), the American Civil Liberties Union (ACLU), and the National Right to Life Committee (NRLC).

III. PLANNED PARENTHOOD AND THE RISE OF WOMEN'S RIGHTS

> Founded in 1942, Planned Parenthood was the successor to Margaret Sanger's American Birth Control League and became the most influential birth control lobby in the United States, providing education and services in clinics operated by the organization, offering marriage counseling, and campaigning for the reform of laws restricting the distribution or advertisement of contraception.[83]

In the 1970s, when Edelin was tried, PPFA had worked to portray itself as an organization focused on medical care as well as the harms associated with out-of-control population growth.[84] Formally known as Planned Parenthood-World Population at the time, the organization sponsored efforts at home and

82. *Id.* at 326–29.

83. Ziegler, *supra* note 81, at 305; *see generally* LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 242–78 (3d ed. 2002) (providing a historical study of Planned Parenthood).

84. *See* Ziegler, *supra* note 81, at 306–07.

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abroad not only to provide desired contraceptive services but also to guarantee sustainable rates of population growth, especially in developing countries.[85]

Edelin appealed to Planned Parenthood partly because of the emphasis the organization put on physicians' rights. In the period leading up to Edelin's trial, Planned Parenthood stayed mostly on the sidelines, becoming involved in the months immediately following his conviction.[86] Participating in Edelin's appeal, the organization continued to focus on the physicians' rights claims stressed by the Court in *Roe* and emphasized by Edelin's counsel at trial.[87] In its amicus brief supporting Edelin, Planned Parenthood argued that the primary right concerned in abortion cases was the right of the physician—"to administer treatment according to his professional judgment up to the point where [there are] important state interests . . . ."[88] Although women's rights and needs were "facilitated" by those of physicians, abortion was not described as a matter of sex equality but instead as "a medical matter which is best governed by the exercise of physician responsibility."[89]

By contrast, following his conviction, Edelin himself abandoned physicians' rights rhetoric. In April 1975, Edelin spoke to a gathering of supporters at the Chicago Hyatt Regency Hotel and proclaimed that abortion was a women's issue.[90] As he explained: "once a woman makes up her mind to have an abortion, she should be given professional and highly qualified treatment."[91] Edelin had taken the same approach earlier that year at the national conference held by the National Abortion Rights Action League (NARAL), the nation's largest single-issue group in favor of legalized abortion.[92] At the organization's 1975 conference, Edelin explained: "The central issue we've all been fighting for is freedom of choice."[93] Representative Paul McCloskey, another major speaker at the Conference, elaborated on this point, describing abortion as a "woman's 'right of free choice.'"[94] According to Edelin himself, the central issue was no longer the rights of physicians like himself but instead the needs and concerns of women.

85. *Id.* at 306.

86. For a sample of Planned Parenthood's activities, see *supra* notes 83–85 and accompanying text.

87. *See* Brief as Amicus Curiae on Behalf of the Planned Parenthood Federation of America at 7, Commonwealth v. Edelin, 359 N.E.2d 4 (1976) (No. 81823), *in* ACLU Papers, *Edelin v. Massachusetts*, *supra* note 47.

88. *Id.* at 3.

89. *Id.*

90. J.I. Adkins Jr., *Convicted Doctor Talks to Chicago Supporters*, CHI. DEFENDER, Apr. 14, 1975, at 24.

91. *Id.*

92. SUZANNE STAGGENBORG, THE PRO-CHOICE MOVEMENT: ORGANIZATION AND ACTIVISM IN THE ABORTION CONFLICT 84 (paperback ed. 1994).

93. *See Free Choice Held Issue In Abortion*, N.Y. TIMES, Jan. 26, 1975, at 36.

94. *Id.*

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Planned Parenthood began stressing arguments about women's rights in the same period. In May 1975, for the first time, the organization endorsed a resolution describing abortion in explicitly feminist terms by stating "[p]arenthood ceases to be the primary . . . means to self-fulfillment for women, and becomes instead a matter of genuine choice, one among a number."[95] In January 1976, the organization approved a measure stating: "growing opposition to the Supreme Court Decision on Abortion is an urgent and serious threat to the issue of freedom of choice."[96] In June 1976, the Board adopted a plan of action on sex equality that described *Roe* as a women's rights decision.[97] By the fall of 1977, the Board was circulating a copy of the National Plan of Action that emerged from the celebration of International Women's Year, an event dedicated to analyzing the state of women's rights in the United States and proposing future paths of development.[98] The Board stressed the parts of these materials describing *Roe* as a decision "which guarantee[s] reproductive freedom to women."[99]

The public spotlight cast by Edelin's trial made apparent several strategic reasons to focus on women's rights rather than on those of physicians. First, because of the publicity surrounding the trial, Planned Parenthood had occasion to rethink the appeal of arguments about physicians' rights. In the years before *Roe*, many supporters of legalized abortion believed that arguments about physicians' rights were more moderate and, therefore, more likely to persuade legislators, judges, and other members of the political mainstream.[100] As Dr. Joseph Nellis of NARAL explained in 1971:

> [C]ourts would more easily strike down state anti-abortion laws if the test case were presented in terms of interference with the physician's practice of medicine than if it were done on the basis that many women's rights groups have advocated—namely, that anti-abortion laws represent an unconstitutional interference with the right of a woman to control her own body.[101]

95. Planned Parenthood Fed'n of Am., Board of Directors Meeting Minutes: Saturday Afternoon Session 167 (May 31, 1975), *in* Planned Parenthood Federation of America II (on file with the Sophia Smith Collection & Women's History Archives, Smith Coll.).

96. Planned Parenthood Fed'n of Am., Board of Directors Meeting Minutes: Morning Session 105 (Jan. 31, 1976), *in* Planned Parenthood Federation of America II, *supra* note 95.

97. Planned Parenthood Fed'n of Am., Board of Directors Meeting Minutes: Afternoon Session 124–49 (June 5, 1976), *in* Planned Parenthood Federation of America II, *supra* note 95; Proposed National Plan of Action at the National Women's Conference 32 (Nov. 18–21, 1977), *in* Planned Parenthood Federation of America II, *supra* note 95 [hereinafter Proposed National Plan of Action].

98. *See* Proposed National Plan of Action, *supra* note 97, at 32.

99. *Id.*

100. *See supra* notes 87–89 and accompanying text; Eileen Shanahan, *Doctor Leads Group's Challenge to Michigan Anti-Abortion Law*, N.Y. TIMES, Oct. 5, 1971, at 28.

101. Shanahan, *supra* note 100.

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These arguments had a practical resonance: the federal government played a significant role in the funding of domestic and international family planning, through programs like the Family Planning Services and Population Research Act of 1970 and the activities of the United States Agency for International Development.[102]

In the spotlight cast by *Edelin*, members of Planned Parenthood had reason to reevaluate the physicians' rights claims thought to be attractive to elected officials and courts. Not only had a trial court and an attorney general's office sided with the antiabortion movement in *Edelin*, but in June 1976, Planned Parenthood members noted a steep decline in federal family planning aid, both in the context of abortion and otherwise.[103] *Edelin* made clear that old allies might no longer be available to Planned Parenthood, while new allies, especially feminists, had not yet been reached.[104]

As importantly, the spotlight cast by the *Edelin* trial made it clear that alliances with the women's movement would be strategically important to Planned Parenthood. Especially after his conviction came down, many of Edelin's most vocal supporters were feminists.[105] Nationally, women's groups also sided with Edelin, as did the Women's Division of the American Jewish Council.[106]

In the same period, the women's movement and its arguments became a more established part of the political mainstream: the Equal Rights Amendment to the U.S. Constitution was passed by both houses of Congress, President Jimmy Carter established the National Advisory Committee for Women during the United States' hosting of the International Women's Year Conference in 1977, and women's groups successfully lobbied each of the major parties to endorse a number of women's reforms.[107]

102. JUDITH PENCE ROOKS, MIDWIFERY AND CHILDBIRTH IN AMERICA 52 (1997); U.S. AGENCY FOR INT'L DEV., FAMILY PLANNING TIMELINE (2009), *available at* http://www.usaid.gov/our_work/global_health/pop/timeline_b.pdf; *see also* Meeting Minutes, *supra* note 97, at 3–4 (stressing the dramatic cuts in the mid-1970s to the federal funding of family planning).

103. *See* Meeting Minutes, *supra* note 97, at 3.

104. *Id.* at 4. *See also supra* notes 95–99 and accompanying text (discussing Planned Parenthood's recognition of the need to reach out to women's organizations).

105. *See Jewish Women Vow Drive for Abortion*, N.Y. TIMES, Mar. 5, 1975, at 44; John Kifner, *Convicted Boston Doctor Put on Probation for Year*, N.Y. TIMES, Feb. 19, 1975, at 1 (explaining participation of women's groups).

106. *See* Kifner, *supra* note 105.

107. CAROLINE BIRD, NAT'L COMM'N ON THE OBSERVANCE OF INT'L WOMEN'S YEAR, WHAT WOMEN WANT: FROM THE OFFICIAL REPORT TO THE PRESIDENT, THE CONGRESS AND THE PEOPLE OF THE UNITED STATES 9, 60 (1979) (providing a contemporary take on the International Women's Year and the proposals emerging from it); Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1131, 1150 (2003); Andrew B. Coan, *Talking*

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While "women's arguments" seemed more politically advisable to Planned Parenthood, physicians in the same period appeared to be uncertain allies. After all, many of the witnesses against Edelin had been physicians.[108] Some physicians roundly condemned Edelin's conviction.[109] However, the conviction served as a reminder that the support of the medical community as a whole could not be taken as a given.

Planned Parenthood's leadership, thus, had reason to publicize efforts to advance the rights of women instead of trials like Edelin's that focused on physicians' rights. At the June 1976 meeting of the National Board, Planned Parenthood emphasized a measure endorsing women's rights in all contexts, even those unrelated to family planning.[110] For example, Marilyn Fowler, a member of the Board, explained of the measure: "[W]e want women's organizations. There's a lot of political clout out there. And we're not getting it, because we can't come out and make this kind of a statement."[111] Lenore McIntyre, another Board member, agreed: "[W]e're going to form coalitions with other groups—ask other groups to approve policy statements supporting family planning, and all aspects of it. And I feel that it's important that we, then, support [these statements]."[112]

By the time Fowler and McIntyre were speaking, it was clear that there was little to be gained for the organization in publicizing trials like *Edelin* or in heavily investing organizational resources in similar headline prosecutions. Because women's rights arguments seemed the most strategically advantageous to the leadership of Planned Parenthood, and due to the lack of reliance on these issues during court proceedings, the organization lost interest in headline trials like *Edelin*.

PPFA had expected *Edelin* to publicize a particular understanding of the abortion issue: one that was medical and above the political fray. Instead, media coverage of the trial and public response to it exposed the weakness of its medical arguments about abortion. *Edelin* might have won publicity for the organization, but the leaders of PPFA had found themselves unable to control media coverage of the case or the public understanding of it.

Originalism, 2009 BYU L. REV. 847, 853–54. Note that the Equal Rights Amendment ultimately fell three states short of ratification. Coan, *supra*, at 853–54.

108. *See, e.g.*, Letter from Frank Susman to Robert Sunnen, *supra* note 47, at 4.

109. Altman, *Implications of Abortion Verdict*, *supra* note 70.

110. *See* Meeting Minutes, *supra* note 97, at 147, 149.

111. *Id.* at 147.

112. *Id.* at 149.

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IV. THE ACLU AND THE PROBLEM WITH FETAL RIGHTS

Founded in 1920, the ACLU at the time of the *Edelin* trial was one of the largest civil liberties organizations in existence.[113] In the late 1960s, former members of the generally more radical New York Civil Liberties Union (NYCLU) assumed positions of leadership within the organization.[114] While members of the NYCLU, Aryeh Neier, Ira Glasser, Alan Levine, and others had endorsed a broad civil liberties agenda.[115] As Samuel Walker writes, the group believed that "[t]he ACLU's task . . . was to bring promises of the Bill of Rights to . . . previously neglected areas of American life."[116] In order to achieve this task, the ACLU underwent dramatic expansion, bureaucratization, and diversification of interests in the 1970s and 1980s.[117]

Edelin appeared immediately attractive to the organization. The trial fell at the intersection of several of the group's major areas of interest: defendants' rights, due process, abortion rights, and rights to medical treatment.[118] Moreover, the trial cast many of these issues in a light that was sympathetic to the ACLU's cause: Edelin portrayed himself in the national media as a doctor committed to serving the needs of poor, minority communities and as a victim of a surprise prosecution.[119]

The organization involved itself heavily in the early stages of the *Edelin* litigation. Frank Susman, a key member of the organization, attended every day of the trial, reporting back to Jimmye Kimmey and Judith Mears, leaders of the national ACLU.[120] Mears corresponded with and advised Edelin's trial counsel, William Homans.[121] The organization also took a leading role in Edelin's appeal, concluding that "abortion [is] a medical matter which is best governed by the exercise of physician responsibility . . . ."[122]

The ACLU ultimately lost interest in headline trials like *Edelin*, however, but not because of the decline of physicians' rights issues. Instead, as we shall see, *Edelin* revealed that while a significant portion of the national leadership of the ACLU supported fetal rights, the organization proved unable to control how its own members interpreted *Edelin*. Becoming deeply involved in

113. SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 3–4 (1990).

114. *Id.* at 299.

115. *Id.*

116. *Id.*

117. *Id.* at 314.

118. On the ACLU's interests in the period, see WALKER, *supra* note 113, at 226–340.

119. *See* Reinhold, *supra* note 43.

120. *See* Letter from Frank Susman to Robert Sunnen, *supra* note 47, at 1–7.

121. *See, e.g.*, Letter from Judith Mears to William P. Homans, Jr. (Aug. 14, 1975), *in* ACLU Papers, *Edelin v. Massachusetts*, *supra* note 47.

122. *See* Memorandum from ACLU on *Roe v. Wade* (1975), *in* ACLU Papers, *Edelin v. Massachusetts*, *supra* note 47.

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headline abortion trials like *Edelin* seemed likely to exacerbate already damaging divisions within the organization. Even those supportive of fetal rights had reason to avoid further prosecutions like *Edelin*: these advocates had no interest in answering the complex, practical questions that accompanied the recognition of fetal rights.

The issue became apparent in 1976, when the organization's Privacy Committee first addressed the *Edelin* trial. In June, the members present were divided about the nature of abortion rights, the existence of fetal rights, and the proper interpretation of *Roe v. Wade*.[123] Some members of the Committee believed that, "if the fetus [was] aborted . . . when the chances for survival are high . . ." there might be an obligation for physicians to save the fetus's life, and women's rights to an abortion might be limited.[124] The divisions within the organization became plainer at a June 1976 meeting.[125] Then, Dr. Irwin Kaiser, an obstetrician invited to speak by the Committee, explained to the Committee how medical issues might shape privacy rights in the abortion context.[126] Might abortion rights depend on how much medical knowledge was available about the condition of the fetus?[127] Would the scope of privacy in the context of abortion depend on the technology available to support the fetus?[128] The Privacy Committee could not reach an agreement on any of these questions.[129]

If anything, the meeting raised more questions than it answered. In the summary of the meeting, a number of questions offered by Committee members were recorded, such as: "If the fetus lives, the question arises as to who should support the child—the mother, father or the state?"[130] Other questions addressed whether mothers would have to sign adoption papers before receiving an abortion and whether fathers would have the right to save otherwise viable fetuses in which mothers had no interest.[131]

Later, in October 1976, the depth of the divisions between those on the Committee was on full display. Member Alvin Schorr argued that the Committee should "adopt the position that the right to abort is the right to kill, accepting the full implications of the Supreme Court's definition of

123. ACLU, Privacy Comm. Meeting Minutes (June 16, 1976) (on file with Mudd Library, Rare Books & Manuscripts Div., Princeton Univ.).

124. *Id.* at 4.

125. *Id.* at 3.

126. *Id.*

127. *Id.* at 1–2.

128. ACLU, Privacy Comm. Meeting Minutes, *supra* note 123, at 2.

129. *See id.* at 1–3 (acknowledging Dr. Kaiser's memorandum and noting how abortion rights issues "will consume much of next session's agenda").

130. *Id.*

131. *Id.* at 3.

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abortion."[132] Member Bud Fensterwald argued for "the benefit of deferring to the medical profession to make decisions" about the scope and nature of privacy rights in the abortion context.[133] By contrast, Member Peter Bernbaum argued that women's privacy rights were limited by the rights of the fetus, suggesting that "the medical profession should be given the responsibility to keep the fetus alive by using reasonable methods."[134]

Divisions within the ACLU about fetal rights were troublesome for several reasons. First, the spotlight cast by *Edelin* drew the group's attention to other related issues that were dividing the organization. Beginning in the mid-1970s, female members of the national ACLU had criticized the organization's leadership for excluding and potentially even discriminating against women.[135] Advocates like Pauli Murray had called for the organization to adopt a sort of affirmative action policy ensuring that women took positions of leadership in the organization.[136] Future headline trials like *Edelin* seemed likely to reopen divisive conversations about the position the ACLU should and did take on women's issues.[137] Indeed, with regard to the *Edelin* trial, some within the organization took the position that women's reproductive rights had been defined too broadly at the expense of fetal rights.[138] Because the ACLU was already concerned about its reputation for gender discrimination, publicizing or participating in more headline trials like *Edelin* seemed problematic.

Just as importantly, though, celebrity trials like *Edelin* were also bringing attention to a question that was proving to be troublesome for the national ACLU: how to balance the group's commitment to defendants' rights with its substantive values. In the same period, this problem emerged in the context of rape reform. In December 1976, ACLU members Gara LaMarche and Faith Seidenberg encouraged the organization to begin a campaign against laws preventing prosecutions for criminal rape.[139] Many members of the ACLU Equality Committee saw the issue as one involving sex discrimination. For example, Brenda Feigen Fasteau stated that it was "very difficult to obtain a

132. ACLU, Privacy Comm. Meeting Minutes 2 (Oct. 13, 1976) (on file with Mudd Library, Rare Books & Manuscripts Div., Princeton Univ.).

133. *Id.* at 3.

134. *Id.*

135. *See* ACLU, Special Bd. Comm. on Role of Women Within ACLU Meeting Minutes 2 (Nov. 10, 1972) (on file with Mudd Library, Rare Books & Manuscripts Div., Princeton Univ.).

136. *Id. See also* Burt Neuborne, *Introduction of Justice Ruth Bader Ginsburg*, 95 CAL. L. REV. 2213, 2213–14 (2007) (stating that Murray "fought inside the ACLU for women's rights").

137. *See* ACLU, Special Bd. Comm. on Role of Women Within ACLU Meeting Minutes, *supra* note 135, at 2.

138. ACLU, Privacy Comm. Meeting Minutes, *supra* note 123, at 3.

139. *See, e.g.*, ACLU, Equality Comm. Meeting Minutes 2–3 (Dec. 9, 1976) (on file with Mudd Library, Rare Books & Manuscripts Div., Princeton Univ.).

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conviction if any evidence of the victim's past sexual history is admitted."[140] LaMarche echoed this concern, stating that it was plainly discriminatory that, "in none of the fifty states can a woman charge her husband with rape."[141] Though sharing Fasteau and LaMarche's concerns about sex discrimination, other members expressed concern that rape reform would give little weight to defendants' rights.[142] For this reason, Marshall Beil expressed "reservations about whether such injustices should be the province of the criminal law."[143] Member John Gregory similarly suggested that marital rape might not be fairly handled in criminal law by noting that, in family law, "withholding of sex is considered grounds for divorce."[144]

Headline trials like *Edelin* also seemed likely to raise a related and equally worrisome problem. On the one hand, the ACLU Privacy Committee supported fetal rights and had endorsed a major resolution in favor of recognizing them.[145] On the other hand, headline trials raised concerns about defendants' rights issues typically of importantance to the organization, such as procedural and due process rights. Addressing the kinds of issues raised in *Edelin* and trials like it seemed more likely to result in debate and acrimony rather than any form of concrete progress.

Because headline trials like *Edelin* seemed to be more trouble than they were worth, ACLU leaders lost interest in publicizing or participating in blockbuster abortion prosecutions. Any gains in positive publicity seemed likely to be outweighed by costly divisions within the organization about fetal rights, women's rights, and defendants' rights.

V. THE NRLC AND THE DISENCHANTMENT WITH THE COURTROOM

Before 1980, the NRLC was the largest national anti-abortion organization, serving as a strategy clearinghouse for state and local groups and playing a central role in the *Edelin* litigation.[146] In the same period, in spite of successfully obtaining a conviction, the NRLC lost interest in headline trials

140. *Id.* at 3.

141. *Id.* at 5.

142. *Id.* at 4–5.

143. *Id.* at 5.

144. ACLU, Equality Comm. Meeting Minutes, *supra* note 139, at 3.

145. *See* ACLU, Privacy Committee Meeting Minutes 1 (Nov. 10, 1976) (on file with Mudd Library, Rare Books & Manuscripts Div., Princeton Univ.) (discussing the Committee's agreement that when "a fetus is born alive . . . the physician is under obligation to use all available means to save its life and help it to survive").

146. *See* Ruth Ann Strickland, *Abortion: Prochoice versus Prolife*, *in* MORAL CONTROVERSIES IN AMERICAN POLITICS: CASES IN SOCIAL REGULATORY POLICY 3, 21 (Raymond Tatalovich & Byron W. Daynes eds., 1998); *see also supra* note 54 and accompanying text (describing the participation of Dr. Mildred Jefferson and Dr. Frederick Mecklenburg, key leaders of the NRLC, in the *Edelin* case).

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like *Edelin*. The decision not to pursue more prosecutions may seem puzzling. *Edelin* gave many antiabortion advocates a national platform for spreading their ideas about fetal rights and the beginning of human life.[147] The publicity surrounding Edelin's trial and conviction also suggested to the public that some government officials and ordinary citizens agreed with the NRLC's definitions of *Roe* and of abortion rights.[148] Even the Massachusetts Supreme Judicial Court's ruling on appeal in Edelin's favor seemed to leave a door open for future prosecutions: if defendants had adequate notice of the criminality of their conduct, a conviction like Edelin's might be upheld.[149]

So why did the NRLC abandon trials like *Edelin*? Part of the answer lies in the very headline nature of the trial. In the years immediately following *Roe*, the NRLC worked to broaden the appeal of antiabortion advocacy, especially among poor, non-white, or non-Catholic citizens. For example, in criticizing the Family Planning Services and Research Act, Connie Marshner of the U.S. Coalition for Life testified extensively about alleged discriminatory and manipulative actions taken by pro-abortion physicians against poor, non-white women.[150] For the many women who were "poor and therefore dependent on the good will of the State, [choice] [was] a myth," she explained.[151] The NRLC and its allies also stressed arguments that proponents of legalized abortion were racist, willing to use abortion to commit "race genocide" and reduce the number of African-American children being born.[152]

In the same period, the NRLC tried to establish that the antiabortion movement had a broad base and was not exclusively Catholic. Toward this end, in 1973, the group formally separated itself from the Catholic Church.[153] Throughout the 1970s, the group's newsletter, *National Right to Life News*, publicized stories intended to show the opposition of a number of religious denominations to legalized abortion.[154] In 1975, the group also appointed Dr.

147. *See, e.g.*, Letter from Frank Susman to Robert Sunnen, *supra* note 47, at 1–4 (summarizing the testimony of prominent antiabortion witnesses at the trial); *see also Abortion Witness Cites Procedure*, N.Y. TIMES, Jan. 18, 1975, at 33; *Doctor to Testify Against Another in Abortion Trial*, N.Y. TIMES, Jan. 11, 1975, at 19 (summarizing antiabortion testimony).

148. *See, e.g.*, Anderson, *supra* note 43.

149. Commonwealth v. Edelin, 359 N.E.2d 4, 17 (Mass. 1976).

150. *Dep'ts of Labor & Health, Educ., & Welfare & Related Agencies Appropriations: Hearing Before the S. Subcomm. on Dep'ts of Labor & Health, Educ. & Welfare Appropriations of the S. Appropriations Comm.*, 93d Cong. 74–87 (1974) (statement of Connie Marshner, U.S. Coalition for Life).

151. *Id.* at 5353.

152. *See* Ziegler, *supra* note 81, at 326–29; *Woman Doctor Calls Abortion "Private Death Contract"*, CHI. DEFENDER, Mar. 11, 1974, at 18.

153. Charlton, *supra* note 77.

154. *See, e.g.*, *Baptists to Consider Pro-Life Resolution*, NAT'L RIGHT TO LIFE NEWS, July 1976 (on file with Nat'l Right of Life News Collection, Schlesinger Library, Harvard Univ.);

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Mildred Jefferson as president.[155] As indicated in strategy papers of the Committee to Defend Pro-Life Group, the NRLC encouraged Jefferson to take a leadership role partly in order to demonstrate that the antiabortion movement was independent from the Catholic Church and appealed to non-Catholics.[156] Jefferson offered a dramatically different image of anti-abortion advocacy: whereas the public associated anti-abortion advocacy with white, Catholic, male religious leaders, Jefferson was a female, African-American, Methodist physician.[157]

Dr. Edelin's trial cast doubt on the NRLC's claims to defend racial equality and to reject sectarian bias. In the press, Edelin cast himself as a hero to poor, non-white women to whom reproductive health services had been denied.[158] Further, after his conviction, Edelin told the press that the verdict against him was the product of racial discrimination.[159] The press often mentioned that Edelin was the first African-American chief resident at Boston's City Hospital, sometimes insinuating that prosecutors had targeted Edelin on that basis.[160] Insofar as race relations were concerned, *Edelin* was a public relations disaster for the NRLC.

The publicity surrounding *Edelin* also damaged the legitimacy of the NRLC's claims to be nonsectarian. The press made a good deal of the fact that the Edelin trial was held in Boston, thought to be the most Catholic town in the United States.[161] Newspapers like the *New York Times* suggested that the *Edelin* verdict was anomalous, the product of Catholic bias.[162] Because of the allegations of racism and Catholic bias, the NRLC had reason to avoid further headline trials like *Edelin*. Such a headline trial seemed likely to revive the damaging accusations tied to *Edelin* itself.

As early as 1975, *Edelin* had proven to be a public-relations disaster for the NRLC on these grounds. In May 1975, for example, Edelin appeared on the *Mike Douglas Show*.[163] No antiabortion spokesperson was permitted to

Christian Action Council Names Arizonan First State Chairman, NAT'L RIGHT TO LIFE NEWS, July 1976 (on file with Nat'l Right of Life News Collection, Schlesinger Library, Harvard Univ.).

155. Dennis Hevesi, *Mildred Jefferson, 84, Abortion Activist*, N.Y. TIMES, Oct. 18, 2010 (Obituaries), at B19.

156. *See* DOYLE, *supra* note 57, at 16.

157. *Id.*

158. *See, e.g.*, Reinhold, *supra* note 43 (explaining that Edelin was known for "his concern for indigent patients").

159. *See Doctor Convicted*, *supra* note 70.

160. *See, e.g.*, Leary, *supra* note 43; MacKenzie, *supra* note 43.

161. For coverage stressing the Catholic nature of the Boston community, see for example, *Doctor Asks Judge to Void Conviction in Abortion*, N.Y. TIMES, Feb. 21, 1975, at 28; Robert Reinhold, *Boston vs. the Doctors: Strange Case*, N.Y. TIMES, Apr. 21, 1974, at 223.

162. *See, e.g.*, *Doctor Convicted, supra* note 70.

163. *See* Letter from Ray White to Woody Frazier, *supra* note 49.

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speak.[164] When Edelin was asked why he had agreed to appear, Flip Wilson, a well-known comedian, spoke up, saying that Edelin had come on the program because he was "black, beautiful and innocent."[165] Studio employees then cued the audience to cheer.[166]

Ray White, then the executive director of the NRLC, unsuccessfully petitioned some media outlets to change the tenor of their coverage. White had already recognized the damage done by Edelin's trial: "The Edelin case has been highly publicized . . . . There are those who want to label it as racial persecution, which it is not since the victim who lost his life was . . . black . . . ."[167]

The press *Edelin* generated was so devastating that, following Edelin's successful appeal, the NRLC formally distanced itself from the whole affair. In 1977, Mildred Jefferson, then President of the group, suggested in *National Right to Life News* that the NRLC had merely observed the *Edelin* trial rather than participating in or promoting it. She explained: "I do not agree with those who see the reversal of the Edelin conviction . . . as a 'defeat' for the right-to-life movement."[168] Jefferson was right that the Commonwealth of Massachusetts, not the NRLC, had prosecuted Edelin. However, NRLC leaders had promoted the case and served as key witnesses for the prosecution.[169] The lengths to which Jefferson went to disavow any connection to the case show how damaging the publicity generated by *Edelin* was to the movement.

Moreover, the publicity surrounding *Edelin* made clear that not all grassroots activists or politicians sympathetic to the NRLC approved of the tactical approach used in *Edelin*. In Congress, anti-abortion politicians did not argue that *Roe* and fetal rights were incompatible. Instead, they offered a series of constitutional amendments—the Buckley, Hogan, and Helms Amendments, in particular—stating the Constitution would need to be amended in order to recognize fetal rights from the moment of conception.[170] In rallying the support of new and old allies, the NRLC seemed more likely to

164. *See* Memorandum from Mary Hunt, Treasurer of the Nat'l. Right to Life Comm., Inc., to the NRLC Board (Mar. 25, 1975) (on file with the Gerald Ford Mem'l Library).

165. *Id.*

166. *Id.*

167. *See* Letter from Ray White to Woody Frazier, *supra* note 49.

168. *See* Mildred F. Jefferson, *Lifelines from the President's Desk*, NAT'L RIGHT TO LIFE NEWS, Feb. 1977, at 3.

169. *See supra* note 54 and accompanying text.

170. On the various proposed "human life" amendments to the Constitution, see for example, Charlton, *supra* note 77; *Let States Regulate Abortions, 15 Urge*, CHI. TRIB., Mar. 27, 1973, at B5 (discussing the Whitehurst Amendment); Harriet F. Pilpel, *The Fetus as Person: Possible Legal Consequences of the Hogan-Helms Amendment*, 6 FAM. PLAN. PERSP. 6, 6–7 (1974).

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benefit from criticizing aspects of *Roe* than the group did in pursuing a strategy like the one used in *Edelin*.

By the end of the decade, the NRLC and the groups opposing it had generally lost interest in publicizing or participating in trials like *Edelin*. The NRLC seemed to have had every reason to support the prosecution of abortion providers and to benefit from the press attention that such trials generated. However, the organization could not control how the media portrayed them or even the NRLC itself. *Edelin* became a touchy subject for leaders like Jefferson, who pretended to have been at most superficially involved in the prosecution.

The lessons of the *Edelin* trial, then, seem to be twofold. One is an observation about the practical value of headline trials for interest groups. To the extent that *Edelin* is an example, such trials might undermine a group's cause as much as advance it. Headline trials generate news coverage and public debate. Advocacy groups are not necessarily in the best position to control or shape the publicity surrounding such trials.

A second lesson is about the power of the *Roe* Court. It is a mistake to assume that *Roe* alone ended abortion prosecutions or even headline trials like *Edelin*. These trials continued after *Roe* had been handed down. The Court alone did not end the era of the headline abortion trial. That required the cooperation of the social movement communities most centrally involved in abortion debate.

CONCLUSION

The story of the *Edelin* trial differs from the conventional account of the relationship between *Roe* and criminal trials. Before *Roe*, criminal abortion trials aroused public interest for several reasons. These trials spun tales of seduction, corruption, and despair. Some trials told stories about the dark side of the medical profession. Others offered almost unbelievable narratives about murder, suicide, and unrequited love.

Roe is thought to have put an end to this sort of colorful trial. Because of the power exercised by the Supreme Court, criminal prohibitions on abortion became a thing of the past, and almost all headline abortion trials became unconstitutional.

However, as we have seen, the conventional story of the headline abortion trial is incomplete. First, *Roe* did not end criminal abortion trials so much as it transformed them. *Edelin* was a headline abortion trial. Dr. Kenneth Edelin's story received daily coverage, and simply because of his trial, the doctor himself became a kind of celebrity.

But instead of demonstrating when criminal prohibitions on abortion would be enforced, abortion trials now served as a battleground where the meaning of abortion rights could be contested. Antiabortion advocates in the NRLC argued that *Roe* entitled women only to terminate their personal

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responsibility for a fetus but permitted no one, and especially not a doctor, to destroy a fetus. Edelin and his legal team contended instead that *Roe* protected doctor's rights to practice medicine as they saw fit. *Edelin* proved to be a contest about what *Roe* meant.

It is clear, then, that *Roe* alone could not and did not end the era of the headline abortion trial. Those trials vanished not simply because of the sheer power of the Court. The true end of an era came when competing advocacy groups abandoned the headline abortion trial. Different groups became disenchanted with headline trials for various reasons, but each one suffered because of the unpredictability of the news coverage and the public's understanding of what was going on. *Edelin* suggested to these groups that there was such a thing as bad press, and each organization avoided publicizing or participating in trials like *Edelin* after that point.

The story of *Edelin*, like the story of the criminal abortion trial, is a complex one, then. It is the story of the power as well as the impotence of advocacy groups. It is also at least in part a story about *Roe* itself. And that story is as much about the limits of judicial power as it is one about the dangers of judicial overreaching.

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