The Impact of the ACLU Reproductive Freedom Project

Lee Epstein
Emory University

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Introduction

The American Civil Liberties Union (ACLU) is a unique interest group. It was formed in 1920 to lobby against the United States treatment of World War One conscientious objectors and to defend labor unions.\(^1\) During the last sixty years, however, it has fought various civil liberties violations, defending groups ranging from Nazis to flag desecrators to juvenile delinquents.\(^2\) Thus, the Union has varied its activities rather than focusing on one issue or group.

The Union's "complexity" helped it rise to national prominence. Yet, its varied activities caused a problem: unlike groups such as the National Association for the Advancement of Colored People (NAACP), concentration on specific legal issues rarely existed.\(^3\) The ACLU was unable to develop expertise in any single area because its attorneys worked on numerous and varied cases.

The ACLU dealt with this problem by gradually creating "special projects."\(^4\) According to one ACLU staff lawyer, these were "set-up to develop comprehensive plans for combatting recurring problems."\(^5\) The Reproductive Freedom Project (RFP) is one of these special projects. It deals primarily with three "reproductive" issues: abortion, birth control and sterilization.

In this paper, I discuss the RFP's involvement and impact on abortion litigation. Part I reviews a portion of the relevant interest group literature. Part II provides a brief summary of abortion laws, cases and interest group involvement prior to the RFP's creation. Part III analyzes the circumstances surrounding the RFP's founding and its early court work. Part IV examines the RFP's role in the Hyde Amendment controversy.
Part I. Theoretical Statement

The notion that interest groups affect the judiciary was first noted in 1908 by Arthur Bentley. He claimed that there were luminous instances of the same group pressures which operate through executives and legislatures, operating also through supreme courts and bringing about changes in law in a field above the legislatures, but short of a constitutional convention; changes which no process of legal or constitutional reasoning will adequately mediate, but which must be interpreted directly in terms of pressures of group interests.<6>

In stating his belief of the judiciary's susceptibility to group influence, Bentley noted that the judiciary, like the executive and legislative branches, had entry or pressure points where group influence could be felt. Although he did give some examples where he thought interest group or political pressures came to bear on Supreme Court decision-making in general terms, his major aim was to simply note that group influence had a pervasive role in American politics, including the judiciary.<7>

It was not until publication of David Truman's The Governmental Process in 1951, that a more detailed examination of the role of group interests in the judicial arena was made. For example, Truman found that groups lobby courts to "maintain the status quo."<8> According to Truman, the judicial process could best be examined by looking at group pressure when potential social changes were at stake. By looking at status quo oriented groups, however, Truman failed to point out the usefulness, and often necessity of, disadvantaged groups' resort to the courts.<9>

Clement E. Vose was the first to do an indepth study of interest group litigation. Building on Truman's work, Vose examined interest groups' use of the courts to "end discriminatory practices" rather than to maintain the status quo.<10> Vose also claimed interest groups develop particular strategies to achieve certain objectives, making him the first to assert that
organizations affect judicial decisions through planned tactics. His early works, "NAACP Strategy in the Restrictive Covenant Cases"<11> and Caucasians Only<12> focused on the NAACP. He found that the NAACP successfully litigated on a variety of issues within the civil rights arena. He concluded that its effectiveness was the product of selecting appropriate test cases, hiring skilled attorneys, and the longevity of the organization.

Vose's research established a model for others to both follow and expand. Since publication of Caucasians Only, several persons have analyzed the role of various groups in Supreme Court litigation. Studies relying heavily on Vose's works include Michael Meltsner's Cruel and Unusual: The Supreme Court and Capital Punishment,<13> Robert Belton's "A Comparative Review of Public and Private Enforcement of Title VII of the Civil Rights Act of 1964,"<14> and Karen O'Connor's Women's Organizations' Use of the Courts.<15> Each provides an analysis of a particular organization's litigation strategy in a single issue area.

Since publication of Vose's study of the NAACP and restrictive covenants, several scholars have studied the NAACP's test case approach.<16> For example, Michael Meltsner examined the role of the NAACP in the death penalty litigation that led up to Furman v. Georgia.<17> Meltsner claimed that the NAACP's "cunning staff" was the key to its victory in Furman. Robert Belton, a former NAACP staff lawyer, also wrote about the NAACP's litigation activities. In analyzing the NAACP's role in employment discrimination cases, he concluded that control is critical to interest group success in the courts, although it is often exceedingly difficult to achieve.<18>

O'Connor's Women's Organizations' Use of the Courts is the most recent attempt to determine "the hows and whys of the adoption and success of particular litigation strategies."<19> She discovered that organizations
"adopt" litigation strategies that best fit their specific objectives. Court success is effected by the presence of several factors.<20> However, she found that the importance of each factor varied according to the litigation strategy chosen.<21> Specifically, O'Connor classified several women's rights organizations as either oriented toward court victories, publicity, or involvement as amicus curiae. She determined that each group selected a particular strategy on the basis of their objectives. She then found that often noted indicators of court success varied in importance depending upon a group's strategy.

Thus, many interest group researchers have concluded that organizations not only participate in litigation, but that they develop strategies to affect those decisions. Yet, most research has focused on the NAACP. Few studies have solely concentrated on the American Civil Liberties Union.<22> In prefatory remarks to Constitutional Change Vose explained why he did not analyze the ACLU. He claimed that

The history of the American Civil Liberties Union begged for attention and while interviews with Melvin Wulf and Osmond Fraenkel (ACLU attorneys) started me down the path, the sheer bulk of ACLU papers...dampened any realistic prospect of preparing one.<23>

Vose's problem, combined with the ACLU's diffuse issue focus, makes the ACLU far more problematic to study than groups like the NAACP. To avoid these difficulties, while focusing on the ACLU's litigation strategy, I discuss one aspect of the Union's work: abortion reform. However, other groups are also examined because the ACLU was not the sole player in this controversy. Moreover, comparisons between the NAACP's and the RFP's litigation strategies are made since most of the literature focuses on the NAACP.

Part II. Early Abortion Reform

There were no restrictive abortion statutes in the United States prior to
1821.<sup>24</sup> Prohibitive state laws were first enacted in the 1820's solely to "protect women's life and health."<sup>25</sup> Abortions were risky operations then because antiseptics did not exist. An ACLU attorney explained that the motive (for state laws) was neither religion nor morality. The laws did not discourage sexual promiscuity since they applied to married as well as unmarried women.<sup>26</sup>

Thus, the first laws that appeared in the 1830's were aimed at protecting women, not restraining them.

An abortion reform movement did not evolve until 1962 in the United States. Birth control advocates, such as Margaret Sanger, did not get involved in this issue because they felt it would detract from their cause.<sup>27</sup> In 1962, however, the abortion issue received a great deal of publicity when Phoenix television personality Sherri Finkbine announced that she had taken thalidomide during the early stages of her pregnancy. She desired an abortion, but could not obtain one in the United States. Finally, she received the operation in Sweden where it was discovered that the child would have been severely deformed.<sup>28</sup>

Finkbine's situation evoked sympathetic reactions from various organizations and in essence, led to the creation of an American abortion reform movement. The most important response came from the American Legal Institute (ALI). In 1962, ALI passed a Model Penal code that included an abortion provision that stated that "abortion could be legalized for three causes:"

1) When continuation of pregnancy would gravely impair the physical or mental health of the mother,

2) When the child might be born with a grave physical or mental defect, or

3) When pregnancy resulted from rape, incest or other felonious intercourse, including illicit intercourse with a girl below the age of
sixteen.
In all three cases, two doctors' opinions were needed to abort and the final decision rested with the hospital board.<29>

ALI's model was quite liberal for the era, and as a result, gained support from several organizations. Between 1962 and 1967, groups lobbied state legislatures to pass ALI codes. Several ALI supporters were prestigious organizations that existed prior to the code's formation. For example, the American Medical Association's Human Reproduction Committee urged states to enact ALI codes in a November, 1965 report.<30> Also, the ACLU's New York City affiliate unsuccessfully lobbied for a reform bill in that state.<31>

In many cases, however, organizations formed to advance ALI's cause or, in some cases, to fight for more radical approaches. Individuals realized that group pressure was essential to force abortion law revision because state legislatures resisted change. According to Lawrence Lader, an early abortion reformer, "The first specialized organization to concentrate on the (abortion) problem" was the Society for Humane Abortion.<32>. Founded in San Francisco by Patricia Maginnis, the Society concentrated on informing "the public as to the inadequacies of present laws."<33> Although it initially favored ALI's reforms, both its platform and its founder were controversial. The Society believed that abortion should be

a decision which the persons or family involved should be free to make as their own religious beliefs, values and circumstances may dictate.<34>
It claimed that abortion should be legalized for "some compelling reasons," including the "physical, psychological, mental, spiritual or economic."<35> Thus its platform went far beyond ALI's model. Yet, the Society realized the need for change and used education as a means to achieve that objective. The strategy Patricia Maginnis employed to educate the public, however, caused some problems. According to an ACLU attorney, her tactic was
"to get arrested for handing out abortion referral information on street corners."<36> Evidently, Maginnis's strategy was successful: she was arrested several times in the late 1960's. The ACLU's Northern Californian affiliate "consistently defended her."<37>

Another specialized group that formed in the 1960s was the Association for the Study of Abortion. Its headquarters were located in New York City, but it had members throughout the United States. It primarily aimed at educating the public toward abortion reform through the mass media rather than resorting to more radical tactics. Lader claimed that the Association chose to remain an educational body to increase its fundraising chances through tax exemption. This removed it from direct political action, and as a result, ASA could never become the vehicle for the neoreformists, clerical activists, students and other militants who were pouring into the movement.<38>

Yet, the Association was more "effective" than the Society because it attracted several prestigious and influential members. Thus, "within its limited scope" the Association legitimized the abortion issue.<39>

Yet, between the ALI code's creation in 1962 and its eventual adoption in 1967, neither existing organizations nor specialized abortion groups were successful. Only five states even considered adopting ALI's model abortion code and none adopted them. Codes were not passed because of the "tremendous pressure" from the Catholic Church.<40> However, according to Lader, one positive result of state legislatures' reform attempts was that "abortion was finally thrust into the forefront of public debate." Organizations, including the Central Conference of American Rabbis, passed resolutions supporting ALI codes.<41> Finally in 1967, Colorado became the first state to pass ALI's model. Within three years, eighteen states liberalized their abortion laws to include some form of ALI's abortion provisions. However, by the time the ALI model gained acceptance, Maginnis's more radical view, was espoused by the
ACLU. In 1968, the ACLU's Board of Directors adopted the following policy:

The ACLU asserts that a woman has a right to have an abortion—that is a termination of pregnancy prior to the viability of the fetus—and that a licensed physician has a right to perform an abortion, without the threat of criminal sanctions. In pursuit of this right the Union asks that state legislatures abolish all laws imposing criminal penalties for abortions. The effect of this step would be that any woman could ask a doctor to terminate a pregnancy at any time. In turn, a doctor could accede to the woman's request in accordance with the physician's professional judgment without fear of criminal prosecution. Thus, the decision of whether or not to continue a pregnancy would become one of the woman's personal discretion and the doctor's medical opinion. Both would be free to follow their private consciences in determining whether their religious or moral standards were being violated. No fear of criminal punishment would enter into the decision.

The ACLU holds that every woman, as a matter of her right to the enjoyment of life, liberty and privacy, should be free to determine whether and when to bear children. The Union itself offers no comment on the wisdom or the moral implications of abortion, believing that such judgements belong solely in the province of individual conscience and religion. We maintain that the penal sanctions of the state have no proper application to such matters.<42>

Thus, by 1968, the ACLU officially entered the abortion controversy by denouncing all restrictive abortion laws, including the ALI code. The Union realized that unreformed state laws needed to be challenged through both traditional lobbying as well as litigation. Lobbying alone was not sufficient because this would only lead to state adoption of ALI codes, rather than to the passage of the more liberal laws the Union advocated. By the end of 1968 then the ACLU led a new, reform movement that aimed at repealing old state laws.

One of the most significant organizations that formed as an outgrowth of the ACLU's call for appeal was the National Association for Repeal of Abortion Laws (NARAL).<43> Founded in 1969 by individuals including Lader and Maginnis, NARAL's and the ACLU's goals were similar: repeal of old state laws.

Between 1969 and 1971, the combined efforts of the ACLU, NARAL and several other groups, led to legislative and legal changes. During this period, New York, Hawaii, Alaska and Washington state, repealed their old laws. In
addition, litigation efforts in California successfully liberalized that state's ALI code. In People v. Belous, the California Supreme Court reversed the conviction of a physician who gave abortion referrals.<44> In 1966, Dr. Leon Belous referred a young unmarried couple to a Mexican-licensed physician who performed abortions in California. Shortly after the abortion was completed, both doctors were arrested. Belous was convicted in January, 1967 for "abortion" and for conspiracy to commit abortion under an 1850 California statute that prohibited abortions "not necessary to preserve" a mother's life. In 1969, several attorneys, backed by the ACLU, brought the case to the California Supreme Court.<45> In a 4-3 decision, the court declared the 1850 statute unconstitutionally vague under the Fourteenth Amendment's due process clause. In its decision, the court claimed that there was a "fundamental right of privacy in matters of family, marriage and sex." The California court's decision was "legally" insignificant because it was not binding upon other states. Also, the 1850 statute was not the law in California in 1969.<46> The 1850 statute was amended in 1967 to include an ALI-type code. However, Belous' importance cannot be overlooked because many states had old laws comparable to California's and "because of Belous' interpretation and expansion of the constitutional right of privacy."<47> Moreover, abortion interest groups realized that the courts might be more receptive to their demands than the state legislatures had been.

Thus, the California decision paved the way for abortion litigation and lobbying throughout the country.<48> Two aspects of Belous were especially useful to groups, including the ACLU, in post-1969 court efforts. First, the California court's decision accepted two legal arguments advanced in later cases: vagueness and privacy. Second, defending doctors, which proved to be a viable strategy in Belous, became an important technique in winning abortion
cases. According to one ACLU attorney

criminal defense of doctors who performed abortions were largely successful. Many of these cases were ACLU cases; in most, the Union was at least an amicus.<49>

The ACLU then consistently sought the medical profession's assistance to help it legitimize and eventually legalize abortion.

The first of these early "doctor" cases heard by the Supreme Court was U.S. v. Vuitch.<50> Milan Vuitch, a reputable D.C. physician, performed an illegal abortion. In 1968, he was indicted for violating a provision of the D.C. code which made "criminal the performance or attempted performance of an abortion unless 'done as necessary for the preservation of the mother's life or health' and under the direction of a licensed physician." The U.S. District Court for the District of Columbia dismissed the indictment. Its decision reflected the ACLU's amicus argument and the California Supreme Court's Belous decision: the statute was unconstitutionally vague "since there was no indication whether the term 'health' included mental as well as physical health..." However, the U.S. Supreme Court reversed the district court's ruling. The Court, through Justice Black, claimed that the statute was not impermissibly vague. Black stated that "properly construed...it permitted abortions for both physical and mental health reasons..."

Although the ACLU's participation in Vuitch was limited to submission of an amicus curiae brief, it had a substantial stake in the case. A positive ruling, from the ACLU's standpoint, would have saved the Union time and money in lower court litigation. Thus, even though Vuitch was not altogether a "negative" decision since it expanded the definition of health, the Court's decision was inconclusive. The Court's refusal to commit itself led to increases in litigation on both state and federal levels. One writer claimed that "during 1970 and 1971, an avalanche of cases came before all levels of
courts, some attempting to create a more liberal situation and others attempting to halt or reverse changes taking place.<sup>51</sup>" By 1971, several cases were pending before the Court. Realizing the need for a conclusive abortion ruling, the Court agreed to hear arguments on two cases: <i>Roe v. Wade</i> <sup>52</sup> and <i>Doe v. Bolton</i>.<sup>53</sup>

<i>Roe</i> challenged a restrictive Texas law that permitted abortions only to save a woman's life. Roe, an unmarried Texan, could not receive an abortion there and she did not have the funds to go elsewhere. Sarah Weddington, who later lead NARAL, argued the case for the Population Law Center.<sup>54</sup> <i>Doe</i> involved a 22 year old married, yet unemployed mother of three. Her first two children were taken away from her "because she was unable to care for them; the third was placed for adoption at birth."<sup>55</sup> She attempted to obtain an abortion at a public hospital in Georgia, but was refused. Doe could not afford a private hospital. Margie Pitts Hames, an ACLU National Board Member, argued <i>Doe</i> on behalf of the ACLU.<sup>56</sup> The Supreme Court heard oral arguments on December 13, 1971 and heard rearguments on October 11, 1972. The historic decision was announced on January 22, 1973.

In <i>Roe</i>, the Court held that a woman's right to an abortion is included in her right to privacy. During the first trimester of pregnancy, the Court found that a woman's right to privacy outweighs a state's interest in protecting a woman's health. From the end of the first trimester to viability, a state cannot prohibit an abortion, but it can "reasonably regulate." After viability, a state can prohibit an abortion except when it is necessary to protect a woman's health. The Court's decision in <i>Roe</i> essentially struck abortion laws in 31 states.

In <i>Doe</i>, the ACLU companion case to <i>Roe</i>, the Court reviewed the constitutionality of state abortion restrictions. It found that requiring a
medical committee's approval, doctor's concurrences and residency and hospital accreditation regulations were unconstitutional. Also, the Court held that abortion decisions made during the first trimester were between a woman and her doctor. Further, the Court broadly defined "medically necessary" abortions. Doe effectively invalidated fifteen state abortion laws.

The Supreme Court's 1973 decisions then actually reflected the ACLU's 1968 policy. The Court's adoption of the ACLU's policy was partially a result of the Union's calculated litigation efforts. The factors that Vose and others discussed as important determinants of the NAACP's court victories were present in the ACLU's strategy. The Union's 1968 policy was its goal and it used consistency and test cases to meet that objective.<57> It is ironic then that the ACLU's victory in Doe led to the Reproductive Freedom Project's creation in 1974. The Union felt compelled to create a special abortion committee after such an astounding and conclusive Supreme Court victory because of the reaction to the Court's decisions.

Immediately after Roe and Doe were announced, anti-abortion measures were introduced in state legislatures and in Congress. Both levels of government seemed unwilling to comply with the Court's ruling. In September of 1973, Civil Liberties, the Union's bi-monthly newspaper reported that "At least 188 anti-abortion bills have been introduced in 41 states." Proposed bills included facility and consent requirements. Civil Liberites also claimed that "several states have enacted, or are retaining anti-abortion laws which are clearly unconstitutional, but are being invoked nonetheless. The Union though was particularly disturbed to discover that approximately ten members of the United States House of Representatives were "sponsoring some form of anti-abortion legislation."<58> The Union's newspaper was referring to four different version of a "Right to Life" amendment. Thus the Union felt
compelled to arm itself for legal battles. The Reproductive Freedom Project became its principle weapon.

Negative state and federal reactions to the Court's abortion decisions, however, were not the sole reasons for the RFP's creation in 1974. The ACLU had established a Women's Rights Project (WRP) in 1972 that could have handled "reproductive" cases. Yet, the ACLU realized that several of the WRP's funders were hesitant to finance abortion litigation.<sup>59</sup> Moreover, the WRP's leaders desired to concentrate on other types of women's issues.<sup>60</sup> Thus, the ACLU created the RFP for internal as well as external reasons. Comprised of an advisory committee of several attorneys and a staff, the RFP viewed itself as a watchdog of the Court's 1973 decisions.<sup>61</sup>

Part III: Early Litigation Efforts

Immediately after its creation, the RFP's first director, Judith Mears expressed her views on the current abortion situation. She claimed that

Unfortunately, the Supreme Court's abortion decisions no more resolves that issue than its 1954 decision in <i>Brown v. Board of Education</i> resolved the issue of racial integration in public schools...The questions left unanswered by Roe and Doe are, to an important extent, medical questions. If we are to avoid the disheartening prospect of history repeating itself, a la <i>Brown</i> with twenty years of legislative and litigative battles ahead over abortion, we must have the cooperation and active assistance of physicians who can assert the primacy of their medical judgement in this sphere.<sup>62</sup>

Thus, Mear's goal was clear: she wanted the abortion controversy quickly disposed. The medical profession's assistance seemed vital. Prior to Roe and Doe, the use of doctors in litigation a reasonably successful ACLU strategy. Belous and Vuitch paved the way for the Supreme Court's 1973 decisions. Mears assumed this method would work again. However, the RFP's path to a quick resolution of the abortion controversy was replete with obstacles. The
prolife groups that had organized prior to 1973, gained momentum after Roe and Doe. This strongly mirrored the anti-abortion movements that emerged in the 1960's to lobby against the ALI code and those that lobbied against "repeal" in the early 1970's. As in these periods, the 1973 decisions increased prolife drives throughout the United States. They fought on both state and federal levels to limit Roe's and Doe's applications through "direct political action."<63> Thus, the RFP was challenged by prolife groups on three fronts: in state legislatures, in Congress and in the courts. The RFP and other prochoice groups were initially successful on all fronts.<64> Congress rejected human life-type legislation and many states refrained from enacting abortion restrictions. Yet, pro-choice groups were forced to legally challenge anti-abortion statutes in states where their lobbying attempts had failed.

One of the earliest post- Roe challenges to reach the Supreme Court was Planned Parenthood v. Danforth.<65> Here, RFP director Judith Mears successfully convinced the Court to strike a Missouri law that required informed, written or voluntary consent prior to an abortion.<66> However, the Court sustained the various record-keeping requirements of the same law. Nonetheless, the RFP's victory was substantial, both in terms of its affect on similar states' laws and in light of the opposition's size. Over twenty pro-life groups filed amicus curiae briefs against the RFP's position.<67>

The RFP's initial court successes, though, were not necessarily the result of selecting appropriate test cases or from many of the other strategy factors discussed in the literature. Rather, it appeared that the Supreme Court sought to remain consistent with its 1973 decisions. This situation was comparable to the Court's early post- Brown rulings. However, as with the busing decisions, states and the federal government discovered creative ways
to impede full implementation of the abortion decisions. Legislatures began to pass abortion funding restrictions and as in the later desegregation cases, the Court pulled back from its original hardline decision. Unfortunately for the RFP, the funding issue became its major concern. Although the RFP remained active in all the various aspects of the abortion issue through lower court litigation<68> and through its reproductive dockets<69>, the majority of its Supreme Court litigation involved funding issues.

Early funding litigation involved two separate issues: first, the right of publicly financed hospitals to refuse abortion services and second, the use of state medicaid funds to pay for non-therapeutic abortion expenses. Legislatures passed laws regulating both issues.

These limitations blocked Roe's and Doe's in the same way that "with all deliberate speed" impeded Brown's application. Prior to 1973, rich women found ways to receive abortion services: they traveled to other states or other countries. Yet, poorer women could not obtain abortions. Many assumed that the 1973 decisions would provide them with services, in the same way people assumed Brown automatically gave blacks equal educational opportunities. However, financial limitations made this impossible to implement. Low-income women could not obtain services without financial assistance. In 1974 ACLU attorney Norman Dorsen noted that

The new right to an abortion is self-implementing in the sense that women and their doctors can arrange for abortions without the need to obtain the permission of some government official. But Congress has already changed this by passing a statute granting federally funded institutions the right to refuse abortion services.<70>

Between 1974 and 1977, the RFP then attempted to fight funding limitations on both state and federal levels. Its efforts paid off in the lower courts.<71> In 1977, however, the Supreme Court ruled against prochoice groups in three companion cases: Maher v. Roe <72> Beal v. Doe <73> and Poelker v.
Doe. <74> Maher involved state medicaid programs. Lucy Katz, Roe's attorney argued that "Medicaid" states, which finance childbirths but do not pay for non-therapeutic abortions, violate the "equal protection rights of women who desire to have abortions." In Beal, Doe's attorney claimed that excluding non-therapeutic abortions from state medicaid plans was "unreasonable" under Title XIX of the Social Security Act. This Act required states to establish "reasonable standards" for medical services. Poelker involved the public hospital issue. ACLU cooperating attorney, Frank Sussman, argued that publicly financed hospitals violated the equal protection clause "by providing publicly financed hospital services and facilities for childbirth without providing similar services and facilities for non-therapeutic abortions."

In all three cases, the Supreme Court ruled against pro-funders. It refused to accept the equal protection arguments presented in Maher and Poelker. In Beal, it held that states acted "reasonably" in excluding non-therapeutic abortions from their medicaid plans.

Thus, between 1971 and 1973, the ACLU fought to fully legalize abortion. Finally, the United States Supreme Court recognized this right in its historic 1973 decisions. However, its 1977 decisions fulfilled Judith Mears' pessimistic prophecy: poor women were no better off after Roe and Doe than blacks were after Brown.

Part IV. The Hyde Amendment

The Reproductive Freedom Project did not surrender after the 1977 decisions. In fact, immediately after its loss in Poelker, the ACLU made abortion its top priority. In its 1977 Annual Report, the Union claimed that the Court's funding decisions

not only eliminated the right of poor women to choose abortion, but cut back on the strong constitutional protections accorded abortion in Roe v.
Wade and Doe v. Bolton.<75>

In an attempt to reverse what it perceived as a potentially negative trend in abortion, the Union instituted a "Campaign for Choice." According to the ACLU, this campaign proceeded on "three levels-public education on abortion, lobbying against state and federal legislation and litigation..."<76> The RFP's primary contribution to this campaign was its legal challenges to the so-called Hyde Amendment. The original Hyde Amendment, which was passed by Congress in 1976 as a rider to the Labor-HEW Appropriations Act, severely limited abortion funding. It permitted Medicaid funding only for abortions "where the life of the mother would be endangered if the fetus were carried to term."

The Hyde Amendment passed for several reasons: first, it reflected the country's "conservative mood." It provided a reasonable as well as "popular" way to decrease government spending.<77> Second, anti-choice groups and the current administration generally opposed Medicaid funding. The Hyde Amendment then resulted from a tremendous amount of internal and external pressures. The RFP realized that it would be a difficult, if not impossible, battle to fight. Yet, the RFP, along with the Center for Constitutional Rights and Planned Parenthood, saw Hyde as a threat to Roe's and Doe's implementation and accordingly, pursued litigation. Thus, these three groups immediately initiated McRae v. Califano. <78> McRae challenged the amendment as a denial of equal protection, as religious establishment, as a violation of the First Amendment's free exercise clause and as impermissably vague. The organizations obtained an injunction from the United States District Court for the Eastern District of New York. However, the Supreme Court vacated the district court's decision for reconsideration in light of Maher and Beal. In August of 1977, the district court lifted the injunction and the original Hyde
Amendment took effect.

The RFP and its co-sponsors amended the original suit to account for yearly Congressional revisions of Hyde. In 1977 and in 1978, Congress increased Hyde's sphere. Medicaid funding was now permitted if two doctors certified that carrying a pregnancy to full term would result in "severe and long-lasting physical health damages," or if a pregnancy resulted from a rape or incest incident that was reported within 60 days. The life-endangering standard was also retained.

In 1980, the RFP, the Center for Constitutional Rights and Planned Parenthood brought McRae v. Harris <79> to the same district court where they had initially obtained an injunction. Once again, this court ruled in their favor. In its decision, the court basically adopted the RFP's and its co-sponsor's arguments. It found that the Hyde Amendment's exclusion of medically necessary abortions from the Medicaid program violated First and Fifth Amendment guarantees. Although it refused to accept the religious establishment claim, the court's decision discussed various religious teachings. It concluded that the "major religions... agree that abortion presents religious questions of moral right, duty and conscience, but disagree on what the answer should be. The court, however, found an answer. It ordered "the federal government and all states participating in the Medicaid program to resume paying for 'medically necessary' abortions provided by duly certified providers."

The court stayed enforcement of its decision for thirty days. This enabled the government to appeal to the Supreme Court. In a five to four decision, the Court reversed the district court's decision.<80> Justice Stewart's majority opinion rejected all of the RFP's claims. Stewart found that the Court "cannot overturn duly enacted statutes simply because they may
be unwise, improvident or out of harmony with a particular school of thought."

In his dissent, though, Justice Marshall emphasized the RFP's greatest concerns. Marshall found that

The denial of Medicaid benefits to individuals who meet all the statutory criteria for eligibility, solely because the treatment that is medically necessary involves the exercise of the fundamental right to choose an abortion, is a form of discrimination repugnant to [equal protection]. The Court's decision today marks a retreat from Roe v. Wade and represents a cruel blow to the most powerless members of our society.

Conclusion

The Reproductive Freedom Project's litigative efforts were generally unsuccessful. Although the United States Supreme Court initially ruled in the RFP's favor, it later upheld limits on abortion services in publicly financed hospitals and it upheld the Hyde Amendment's constitutionality in 1980. Thus, while the RFP's early impact on abortion restrictions was positive, its funding challenges had a negative impact. Its later court efforts simply legitimized restrictive statutes.

Two questions remain. First, why did the RFP pursue litigation after its 1977 Supreme Court defeats? It realized that its chances of winning McRae were slight, but it sponsored the case. Its efforts almost paid off in a favorable lower court ruling. More importantly, though, was that the ACLU's victory in Doe would not have been realized if the Union had given up after Vuitton. Obviously, legal abortions would have been obtained without the ACLU. Yet, the Union's persistence set a precedent for the RFP. The RFP believed that continuous litigation eventually would produce results similar to Doe. However, statutes limiting abortion funding differed from ALI-codes in a significant respect: economics. ALI-codes were easier targets than funding statutes because only moral issues were at stake. Moral issues combined with funding concerns made laws such as the Hyde Amendment unbeatable.
Second, what role will the RFP play in future litigation? The RFP and other prochoice groups logically continue to fight funding restrictions because they have nothing to lose. In fact, the Massachusetts Supreme Court recently overturned a 1979 state law "that limited public funding of abortions to life endangering situations."<81> It ordered "the state to pay for all 'medically necessary' abortions for women on welfare." An ACLU attorney claimed that the court's decision was "broader than the right recognized by the United States Supreme Court" in McRae. <82>

However, pro-funding decisions, such as this, are rare. Many states reinstated medicaid restrictions after McRae.<83> It is highly improbable that they will strike limitations within the near future.

The RFP's and other pro-choice groups future problems, however, go beyond the funding issue. Once again, groups must fight legislative and litigative battles. Given the country's "conservative" mood, the move toward enacting human life-type amendments has gained momentum.<84> In fact, "for the first time in its twelve year history," NARAL limited its 1981 agenda to the human life amendment battle.<85> Litigation efforts will have to "regress" to pre-Roe and Doe strategies to challenge seemingly unconstitutional state laws. This appears to be especially evident in light of the Supreme Court's recent decision.<86> Here, the Court upheld a Utah law that requires doctors to notify the parents of a minor prior to performing an abortion. Thus, the funding issue seems insignificant compared with the Court's move away from Roe and Doe. The RFP must recognize this and perhaps, revert to formerly successful strategies to prevent future reversals.
Footnotes


3. The ACLU's 1976 Policy Guide contains approximately 400 "policies" on over thirty six issues.

4. The ACLU has established projects in areas including: Mental Health, Military and Women's and Prisoner's rights.


20. These factors are: longevity, full time staff, sharp issue focus, financial resources, technical data, well timed publicity, coordination with other organizations, coordination between national and affiliates and Solicitor General assistance. (O'Connor, p.17).

21. A litigation strategy involves the bringing of test cases in a particular sequence to have the court expand upon its earlier decisions.

22. Most studies on the ACLU have concentrated on the Union's history rather than its litigation strategy.

23. Vose, Constitutional Change, p.XVI.

24. Connecticut passed the first law limiting abortion in 1821.

25. Most early state laws included that phrase.

27. Also Lader claimed that Sanger "detested the waste and degradation of human life, and pleaded for contraception as a rational and humanitarian alternative" to abortion. (Lawrence Lader, Abortion II- Making the Revolution, Boston: Beacon Press, p.20).


30. Lader, Abortion, p.145.


32. Lader, Abortion, p.147.

33. Ibid.

34. Lader, Abortion, p.148.

35. Ibid.


37. Ibid. Also see Lader, Abortion II, p.33.

38. Lader, Abortion II p.58.

39. Members of the Association included Dr. Robert Hall, a professor at Columbia Presbyterian Medical Center; Cass Canefield, an executive at Harper and Row and Dr. Alan Guttmacher, President of Planned Parenthood. (Lader, Abortion p.148).

40. Lader, Abortion, p.147.

42. ACLU Policy #256 never has been changed. In 1973, the ACLU's directors added the following: In order to make possible a realistic freedom of choice, information, services and facilities respecting...abortion...should be made available by government agencies or government supported agencies to any persons. (Policy #255).

43. For an examination of NARAL's early work, see Lader, *Abortion II*, pp.88-97.


45. Belous was argued by two "private" attorneys, but it was backed by the ACLU.

46. The 1850 statute was amended in 1967 to include the Therapeutic Abortion Act.


51. Potts, p.343.


54. For a discussion of the Population Law Center's involvement in Roe, see Richard Cortner's *The Supreme Court* and *Civil Liberties Policy*, (California: Mayfield Publishing Co., 1975).


57. The Union has never retreated from its original 1968 policy.


60. The WRP concentrates on other aspects of sex discrimination including: "pregnancy, vocational education and pension discrimination." (O'Connor, p.128).

61. Mears claimed that the RFP was created "to ensure compliance with last years Supreme Court decision on abortion..." (Clearinghouse Review, 12 April 1974:735).


63. Potts, p.362.

64. However, Congress did enact an amendment to the Foreign Assistance Act "which forbade U.S. money to be spent on promoting abortion, or abortion services overseas." (Potts, p.365).


66. Mears, along with Frank Sussman, argued this case.

67. This was not the first Supreme Court case where the ACLU faced a great deal of opposition. Over ten prolific groups filed amicus curiae briefs
in Roe and Doe.

68. Besides its lower court litigation in the abortion issue, the RFP was involved in birth control and sterilization cases.

69. The RFP's docket consists of "pending litigation" in the abortion, sterilization and birth control areas. (O'Connor, p.99).


71. The three 1977 funding case were all won in the lower courts.


75. The American Civil Liberties Union, Annual Report 1977, p.16.

76. Ibid.

77. A 1976 Gallup poll asked the following question: "A constitutional amendment has been proposed which would prohibit abortions except when the pregnant woman's life was in danger. Would you favor this amendment...? 45 percent responded that they favored such an amendment, 49 percent opposed it and 6 percent had no opinion.(George Gallup, The Gallup Poll, Delaware: Scholarly Resources, 1978, p.669). The Hyde Amendment then was actually "liberal" since it only restricted abortion funding, not abortions.


80. The four dissenters in McRae were Justices Brennan, Marshall, Stevens and Blackmun.

81. The court's use of "medically necessary" abortions refers to the definition provided by the Supreme Court in Doe.

83. For example, Connecticut reinstated "restrictions on abortion funding, limiting it to cases of rape, incest and danger to the mother," the same week of the Massachusetts Supreme Court's decision. Prior to this, Connecticut funded "medically necessary abortions." (*New York Times*, 22 February 1981).

84. Currently, two versions of a human life amendment have been introduced in Congress. The Helms-Dornan version states that "The paramount right to life is vested in each human being from the moment of fertilization without regard to age, health or condition of dependency." The Garn-Obestar version states that "With respect to the right to life, the word 'person' as used in this article and in the Fifth and Fourteenth Amendments to the Constitution, applies to all human beings irrespective of age, health, function or condition of dependency, including their unborn offspring at every stage of their biological development." President Reagan and Secretary of Health and Human Services, Richard Schweiker, support a human life amendment.


86. This decision was handed down on March 23, 1981.