Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade, 1923-1973

Review Author[s]:
Robin West

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Through the 1920s and 1930s, the support shown by British feminists for alternatives that would have broken down the male wage-earner norm was in effect a political kiss of death. Their rhetorical victories were followed by political defeats as they were unable to muster any real clout, even after women were enfranchised. Women were granted claims to public support only through their role as the dependent wives of wage earners, and social reality continued to be: "constructed to follow not social reality, in all its variety, but the ideal construct of the male breadwinner and dependent wife" (113). Much welfare state research suggests that the labor movement was generally in favor of more elaborate social programs; in Britain, Pedersen demonstrates, the TUC was opposed to programs that would weaken wage claims (203, 333), or make working-class incomes dependent on the good graces of politicians (215–16).

An elaborate system of family allowances developed in France over the same period, with strong support from big business and without much influence from feminists. Employers discovered that *caisses de compensation* could be used to temper the wage claims of French workers and challenge unions, although such programs originated with industrialists whose motives were more purely humanitarian. Family allowance schemes spread through the private sector, particularly in the metals, engineering, and textiles industries, and were eventually nationalized, starting in 1932. French unions, unlike their British counterparts, were unable to block social policies they regarded as contrary to their interests. Economic interests and political muscle do not explain all, however, for the French pronatalists, who played a crucial role, had no economic stake in the outcome. They were motivated by something closer to nationalist sentiment.

Both books show how important working-class pressure was to the development of welfare programs, although the effect was neither simple nor uniform. In Germany, social programs were aimed at regulating and co-opting industrial workers, while in France they were used to temper union demands. British unions, in concert with others, successfully defeated programs that threatened their interests, and so class conflict proved to be a central tension in all three cases. Yet Pedersen's work helps to qualify this simple conclusion, for it was not simply the interests of workers which mattered, but the interests of male workers. The social, as Steinmetz calls it, had a gendered quality that significantly shaped the history of welfare policy.

Bruce G. Carruthers
Northwestern University

David Garrow, *Liberty and Sexuality: The Right to Privacy and the Making of* Roe v. Wade, *1923–1973*, New York: Macmillan, 1994. Pp. 981. $28.00 (ISBN 0-02-542755-5).

David Garrow's remarkable book, *Liberty and Sexuality*, provides an extraordinarily detailed, meticulously researched, and well-told history of legal strug-

gles over the right to control reproduction, from the early twentieth century to the present. The book highlights in particular the legislative battles in the first few decades of the century over contraceptive use (1–139), the litigation over the constitutionality of anti-contraception laws in mid-century, leading up to the successful challenge to those laws in *Griswold v. Connecticut* (196–270), the attempts to reform abortion laws in the late fifties and sixties (335–389), the constitutional challenges to those laws culminating in *Roe v. Wade* itself (473–600), and finally, the Supreme Court's most recent decision regarding the regulation of abortion, *Casey v. Planned Parenthood* (600–705), and its reception and aftermath. As the title promises, the book's primary purpose is to tell the story of the evolution of the relatively novel and far-reaching constitutional, jurisprudential, and political theory on which *Roe v. Wade* rests: that there exists within each individual a right of privacy, recognized and protected by the Constitution, broad enough to encompass the decisions of that individual regarding procreation, including both the decision to use birth control and the decision to terminate a pregnancy. Garrow painstakingly shows how this view emerged from decades of legislative battles in various states between pro- and anti-contraception forces and pro- and anti-abortion groups, struggles over public opinion against the ever-present and powerful resistance of the Catholic Church, and the inevitable infighting between particular strong-willed individuals within the various pro-choice and pro-birth control organizations for prominence, prestige, credit, blame, and, most important, the power to control strategy and the formulation of core constitutional arguments.

Garrow's primary constitutional and historical point is simply that *Roe v. Wade* did not emerge from a conceptual vacuum, and accordingly is not and should not be viewed as an unprecedented extension of pre-existing constitutional entitlements. To the contrary, this book argues, it was the logical as well as political and legal next chapter of a story whose beginnings lay in the turn-of-the-century battles waged by dozens of birth-control activists, including, notably, Kit Hepburn, the mother of the famous movie actor, and Margaret Sanger, the early advocate of birth-control access, against the anti-contraceptive laws of the 1870s—a set of laws attributable in large part to the zealous advocacy of P. T. Barnum, of circus fame. The eventual triumph of *Roe v. Wade,* and the principle of privacy and sexual liberty that it extols, was to put to rest that remnant of late nineteenth-century thought. That triumph—what Garrow at one point refers to as the triumph of the "legacy of Kit Hepburn" over the "ghost of P. T. Barnum" (472)—is the main story line of this book.

There are, however, numerous subplots told in this book, some of which may be of more interest to legal scholars and lawyers than the straightforward constitutional argument laid out above. Let me quickly mention two, and then comment in a little more detail on a third subplot—one which Garrow himself may not have intended.

First, Garrow convincingly shows that contrary to the claims of numerous

commentators (including most prominently Robert Bork) (264–67) *Griswold* was far from being a mere academic exercise regarding an unenforced and meaningless statute. Rather, the Connecticut anti-contraception law had been vigorously enforced in the past, primarily against birth-control clinics, and was being sincerely pressed against Mrs. Griswold and several co-defendants in *Griswold* (196–269). While it was no doubt true that well-off women could readily obtain birth-control information and devices from private doctors, Garrow makes it vividly clear that the law stood as a real barrier to the ability of poor women to control their own fertility and reproductive lives.

Second, Garrow goes some distance toward refuting the increasingly popular argument that *Roe v. Wade,* although a clear legalistic victory for the pro-choice movement, was only a partial political victory. That argument, in short, is that the *Roe* victory cut off necessary grass-roots political work for women's reproductive freedom; work that, had it continued, would eventually have placed abortion rights on a much more solid, political foundation. By converting abortion rights from a political issue into a legal and constitutional principle, the legal wing of the pro-choice movement might have won the battle but lost the war. *Roe* gave constitutional status to abortion rights, but at the cost of aligning those rights with a dubious constitutional argument requiring an activist court in a time in which judicial activism was widely regarded as elitist and suspect. The downside of *Roe* for the pro-choice movement, then, it is now often argued, was twofold: First, it cut off ongoing grassroots political work, and second, it may have significantly strengthened, if not created, the pro-life movement by allying it with a credible constitutional argument regarding the scope of judicial power in a democratic polity.

Although Garrow's book does not speak to all aspects of this quite complicated legal and political dilemma, he does definitively refute one aspect of it. One part of the general pro-choice critique of *Roe* outlined above is the historical claim that the legalistic victory in *Roe v. Wade* did in fact shut off, by obviating the need for, a burgeoning pro-choice grassroots, local politics movement. Garrow shows that this was simply not the case. Rather, the political momentum on the abortion question in the years just preceding the *Roe* victory was decidedly moving against reproductive freedom, as Garrow shows in two chapters of closely argued material (335-473). Whatever its other flaws, it is hard to claim, after Garrow's book, that *Roe v. Wade* cut off a burgeoning grassroots movement that was on its way toward securing abortion rights in the hearts and minds of ordinary people everywhere—and in the bills of state legislatures. If anything, the wind was blowing in the opposite direction.

These two stories alone—the story of the very real harms caused by the anything-but-academic anti-contraception laws and the story of the grassroots struggles for and against abortion rights prior to the successful outcome in *Roe v. Wade*—are clearly well worth the price of the book. But the third subplot, and the one Garrow may not have intended, may be the most captivating story of the three, and that regards the political and moral point of

the constitutional battle for reproductive freedom itself. Put simply, Garrow's book provides perhaps unwitting support for a claim that he may in fact not even agree with, and that is that around the middle of the century, the battle for reproductive freedom was in essence transformed from one waged primarily on behalf of women's health to one waged on behalf of women and men's sexual liberty. Garrow does not himself explicitly raise this transformation as part of his subject matter, nor does he suggest that it is part of his agenda to refute the claim that it did indeed occur. But he does provide some telling anecdotal information.

According to Garrow's narrative, the group of New Haven lawyers handling the litigation culminating eventually in *Griswold v. Connecticut*, which found Connecticut's laws criminalizing the sale and possession of contraceptive information and materials to be unconstitutional (and which later became the primary precedent for *Roe v. Wade*), were faced at one early point with an embarrassment of riches: They had located a number of potential plaintiffs who were all willing and in a position to challenge the Connecticut laws. Three of those potential plaintiffs were middle-aged women with severe health problems for whom an additional pregnancy would be either seriously disabling or life threatening. They all were poor, dependent upon clinics for health care, and prevented from obtaining birth control because of the Connecticut laws in question (144–46). The lawyers, however, were apparently far more taken with their fourth potential plaintiff: a young, healthy, Yale graduate student who had had to drive from New Haven across the state border into New York to obtain birth-control materials, a trip which had taken her a full day and caused some minor inconvenience. This young, healthy plaintiff, according to Garrow, both elicited the sympathy and excited the legal imagination of the team of lawyers (one of which was Fowler Harper, of Yale Law School) for reasons somewhat different and in the lawyers' minds more important than did the middle-aged, health-impaired women. Precisely because she was healthy, her inconvenience in being forced to travel into New York to obtain birth control highlighted the privacy and liberty-related issues, rather than the health or welfare-related concerns. Her case came to be called, by the lawyers, the "civil rights" case, to distinguish it from the other three cases, precisely because it alone raised, to quote Garrow, the "most important . . . and more basic assertion . . . that any married couple should be able to obtain and use contraceptives without obstruction or intrusion by the state" (153).

It was, of course, at the end of the day, privacy and liberty, and particularly sexual liberty, rather than women's health, which became the focus of the reproductive rights movement, as well as eventually the cornerstone of both *Griswold* and *Roe*. The attorneys who litigated *Griswold*, and presumably Garrow as well (at least judging from the title he gave his book), all clearly felt that the privacy interest and the right to liberty that grounds it, rather than an interest in women's health, provided the necessary constitutional plank to support the emerging legal argument that these laws violate fundamental constitutional rights. Perhaps they were right. It is, though, worth

noting that as an historical matter, it seems to have been a concern for women's health—rather than either liberty or privacy—that originally motivated the birth-control reformers. As the issue became constitutionalized, that concern for women's health somehow came to be overshadowed by the more "principled" and decidedly more abstract concern for individual liberty and privacy that eventually formed the core of the constitutional argument put forward in *Roe v. Wade.*

Whatever the merits of this transformation, Garrow's book reminds us that there is nothing necessary about the construction of the constitutional logic of either *Roe* or *Griswold* on the foundations of privacy and liberty. Rather, the constitutional argument that emerged from these cases represents not only particular legal victories, but also a series of strategic and intellectual choices that were made by particular individuals, and that could have been made quite differently. A number of feminist scholars have recently argued that our constitutional jurisprudence, as well as women's political strength, might be significantly improved had these cases been originally conceived and argued and decided as involving women's equality (and hence the equal protection clause of the fourteenth amendment) rather than sexual privacy (and hence the liberty–due process clause of that amendment). It might also be worthwhile wondering how our constitutional jurisprudence, as well as the quality of women's lives, might be different, had these cases been conceived, argued, and decided in a way slightly truer to the motivations of the original reformers, as cases involving the health of women (or, more generally, women's welfare), rather than as involving sexual liberty.

Liberty, equality, and welfare are intertwined in the area of reproductive rights as well as in other aspects of our lives. Furthermore, the relationship is complicated; an increase in privacy or liberty does not always correlate with an increase in welfare or equality, nor is the converse necessarily the case: one does not necessarily come at the cost of the other. Whatever the relationship, what Garrow's book, perhaps unintentionally, helps make clear is that what began as a birth-control movement addressed to and motivated by a concern for women's health did indeed eventually become a movement addressed to the maximization of sexual liberty. Although not Garrow's intended subject, he nevertheless provides a good deal of material for anyone interested in developing this heretofore unexplored aspect of the multifaceted story of *Roe v. Wade.* That fact alone is surely testimony to the extraordinary narrative richness of this remarkable and scholarly book.

Robin West
Georgetown University

Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888–1910* (Oliver Wendell Holmes Devise History of the Supreme Court of the United States, vol. 8), New York: Macmillan, 1993. Pp. xix, 426. $75.00 (ISBN 0-02-541410-0).