# The Supreme Court, the "Facts of Life" and "the Thoughtful Part of the Nation"

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It would be tempting simply to label David Garrow's *Liberty & Sexuality: The Rights of Privacy and the Making of Roe v. Wade* as a long and unrelieved paean to (as the author puts it) "the remarkable women and men who made the right to privacy a meaningful part of America's constitutional heritage." Though an accurate description of Garrow's book, such an approach has at least two disadvantages. The first is that such a "review" would be, well, too short for this journal. The second is a bit more substantive: aside from a few juicy details drawn from what the book jacket breathlessly describes as the "comprehensive, once-secret files of former Justices William J. Brennan, William O. Douglas, and Thurgood Marshall," this book was simply not worth the time and effort it took to get through it.

For all the exhaustive research that went into its 712 pages of text and 269 pages of notes (which are, by far, the most useful parts of the book), he never once considers either an opposing point of view, or the larger implications of the political struggles he describes. In short, the book is excruciatingly long, extraordinarily shallow, and ends simply by running out of "history" and, hence, out of gas, in the middle of an accusation that all "pro-life" advocates "bear some of the blame" for the "terrorism" directed at, and the alleged murders of, abortionists.

Since the book itself is devoid of anything which passes for either historical context or legal analysis, reviewing it serves as a convenient opportunity to highlight what might be termed the "subtext" of his argument about "the making of *Roe v. Wade*." This requires both a description of the manner in which Garrow argues the case for an expansive "right to privacy" and a discussion of the necessary

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implications of his basic argument—that democracy fails when a faction is able to "block" legal changes it considers ill-advised or inconsistent with the public welfare.

The main point of the book is that judicial activism under the rubric of "the right to privacy" is a powerful antidote for the failure of the body politic to adopt policies currently favored by "progressives." He makes this point in every chapter by recounting, in excruciating detail, the background, labors, triumphs, and setbacks of the men and women who worked for nearly fifty years to make abortion a "fundamental right." To Garrow, these activists are (and were) noble, enlightened, and selfless folk, worthy of inclusion "for all time in America's constitutional pantheon."[1]

Not surprisingly, the legitimacy of Garrow's position is very much the centerpiece of debates over the role of courts in a democratic society. That is why the second part of this review involves a discussion of why we—and, more importantly, why Senators charged with the task of screening judicial nominees—should be skeptical of the view that the Constitution empowers judges with names like Stephen Breyer, Sandra Day O'Connor, Harry Blackmun, Anthony Kennedy, William Brennan and John Marshall Harlan to decide *for* us what "facts of life" the nation can understand at any given moment in its history, and to translate those "facts" into a vision of the common good which binds us all.

**The Right to Privacy and the Making of *Roe***

Garrow's story begins at a Farmington, Connecticut, Country Club luncheon on June 8, 1939, where Sally Pease, president of the Connecticut Birth Control League (CBCL), had failed to take into account "the possible press coverage of her luncheon remarks" to the upper-crust Republican women of Greenwich and Fairfield County who comprised much of the organization's membership. She announced that, unbeknownst to taxpayers of Waterbury, a birth-control clinic had been opened by the CBCL in an out-patient building of Waterbury Hospital, "a public institution."

To the Republican women gathered at the country club—and to Connecticut's mainline, Republican press—this was not "news" at all, it was *progress*. "One of the advantages of birth-control work over other social reforms," wrote one a few months later, was that "*individuals* can really accomplish something! You could slave yourself to death for peace and not make a dent in the armed frontiers of

the world. . . ." Birth-control work was, for this woman, different: it gave "whole families a tremendously important boost toward a fundamentally sound home life." The altruism of the work—a "mission" of sorts—was so apparent to the establishment journalists who attended it that the speech warranted only a modest story on page 24 of the Hartford *Courant*, and a page 15 story headlined "U.S. Maternal Mortality Rate Reported Poor" in the Waterbury *Republican*.

Over at the Waterbury *Democrat*, however, the operation of a birth-control clinic in a public hospital was news indeed—*front-page* news. The *Democrat* was, you see, "the voice for Waterbury's Irish, Italian, French-Canadian, and Lithuanian immigrant populations." These families were "almost all Roman Catholic." They also happened to be the targets of the Birth Control League's eugenically-motivated evangelization campaigns.[2] To no one's great surprise, the Catholic Church and those who shared its concern that the ethic which motivated these new evangelists would eventually lead to the acceptance of abortion and the destruction of the family, took a dim view of these developments. They reacted strongly, urging from the pulpit that Catholics avoid the clinic, and demanding that the prosecutors do their duty. The fight was on. It was an early, and important, skirmish in the "culture war" which led to the legalization of abortion.[3]

The first 270 pages of *Liberty & Sexuality* (Chapters 1 to 4) are devoted to the political and judicial struggle waged by the Connecticut Birth Control League (later Planned Parenthood of Connecticut) against the 1879 Connecticut birth-control statute. Until this statute was held unconstitutional by the U.S. Supreme Court in *Griswold v. Connecticut* (1965),[4] Connecticut was unique among the states in that its law governing birth control prohibited not only the sale or distribution of birth-control information and devices, but also prohibited the *use* of birth control by married couples.

Though the statute was challenged unsuccessfully several times, *Griswold* reached the Supreme Court during the heyday of the Warren Court. Understandably, the Court found the restrictions on the behavior of married couples to be outrageous, but they needed a theory which would justify the decision to hold it unconstitutional. They were skittish about utilizing the theory that had been used so successfully to block Franklin Roosevelt's "New Deal" (until he threatened, in 1936, to "pack" the Court), so they put William O. Douglas and a bevy of law clerks to work on the project.

What we know today as "the right to privacy" was the result of that effort, and Garrow's report of the Court's internal deliberations on the topic make fascinating reading for those interested in the development of policy debates within that body. Unfortunately, they will learn very little about policy that they did not know (or figure out) already. What they will learn, however, is that discussions among the law clerks were lively, thorough, and ultimately critical to the development of a legal theory on which the future "right to abortion" would finally rest.

Three of the most interesting tidbits that can be gleaned from Garrow's report are the roles played by Charles Fried (later Solicitor General during part of the Reagan administration), and Judges Steven Breyer and Richard Arnold in the development of the theoretical models Harry Blackmun later used to create *Roe v. Wade*'s holding that abortion is a "fundamental right." Fried, then a law clerk for the late Justice John M. Harlan, actually wrote the passage upon which the Supreme Court relied in *Planned Parenthood v. Casey* as a justification for reaffirming the "central holding" in *Roe*.[5] Breyer, then a law clerk for the late Justice Arthur Goldberg and now President Clinton's nominee to replace Justice Harry Blackmun, was assigned the task of making the case that the little-used and poorly-understood Ninth Amendment[6] would make an excellent foundation upon which to build the case for an expansive reading of the concept of "liberty." Interestingly, Richard Arnold, then law clerk to Justice William Brennan—and front-runner for the appointment to fill the seat vacated by Harry Blackmun until President Clinton chose Breyer—took the most "conservative" positions of the three!

The chapters devoted to abortion (5 to 9) are basically an extended discussion of the ultimately-successful campaign by abortion-rights advocates to convince the courts that the rationale of *Griswold* also invalidated restrictive abortion laws. The litigation sagas of abortion-rights activists in Texas (*Roe v. Wade*), Georgia (*Doe v. Bolton*), and Washington, D.C. (*United States v. Vuitch*) are described in exhaustive detail. So too are the legislative struggles in both New York and California, and the behind-the-scenes judicial intrigue involved in abortion cases around the country.

This is not a book for the short-of-attention. Though the story Garrow tells is an interesting one, and the vignettes he recounts confirm that many of the abortion cases were "decided" before they were even argued,[7] the book is, at bottom, a rather meager contribution

to the literature on what is, by far, the most important socio-cultural and legal battle of the twentieth century.

The reason the book, and its passionate defense of the "right to privacy," is so shallow is that, when all is said and done, it is not really about birth control, abortion, and "privacy" at all. It is a book about *people*. Not just *any* people, mind you. This is a book about the *right kind of people*—"enlightened" people who find the political *status quo* inconsistent with their present views of social morality, and who consider it their moral and social duty to save the rest of us from our narrow and religiously-inspired vision of the common good.

It matters not to Garrow that most of this nation's abortion laws were passed after a campaign by (mostly Protestant) doctors, or that the 1879 Connecticut birth-control statute was passed with the approbation and support of a Protestant-dominated organization (the New England Society for the Suppression of Vice) which included among its members the presidents of Amherst, Brown, Dartmouth, and Yale.[8] Likewise, it does not matter that there is a profound difference in moral and political philosophy between those who today agitate in the legislatures and the courts against laws prohibiting sodomy, physician-assisted suicide, and euthanasia, and those who support them. In Garrow's view, the times have changed, and so have the morals of the *cognoscenti*. It follows, Garrow believes, that the law must change too.

Had Garrow given *any* attention to the social, cultural and legal implications of the "subtext" of his book—an examination of whose views "count" in the political and judical process, and whose do not, it might have been worth reading. In the words of a far more charitable review of the book than this one, he never "directly explores" the "cultural as well as the political effects" of *Roe v. Wade*, and he fails to consider the fact that "landmark decisions sometimes promise more than they deliver."[9]

But this is Garrow's intention. He can "leave out huge chunks of the anti-abortion story," "describe in detail" the "legislative success of the Catholic Church leadership and its disciplined parishioners," and completely ignore "how Protestant fundamentalists took up the opposition leadership later on" because he has no respect, either for them, or for their views. In Garrow's republic, judges must take the law into their own hands whenever it is out of step with the moral sensibilities of "the thoughtful part of the nation,"[10] for he

certainly sees himself and the protagonists of his "privacy book"[11] as part of that elite group.

Garrow's story is *their* story. Not incidentally, it is also a testament to his—and their—belief that "enlightened" people, acting in good faith for the betterment of themselves and the poor, need not be constrained by such details as representative democracy and judicial restraint. Their faith is in those like themselves: other members of the *cognoscenti*, including law professors and sympathetic judges who are all too willing to condone massive social engineering and experimentation in the name of "constitutional law."

In words that "pro-life" advocates would be well-advised to ponder carefully in the context of euthanasia and assisted suicide, Garrow recounts what became of a strategy of "nullification." A "new and very important turn" was taken in 1931, when

> one young supportive woman lawyer, Dorothy Kenyon . . . advanced the novel contention that rather than continuing to focus on winning legislative repeal of federal and state anticontraception laws, it would be preferable "to get away from the law by the simple expedient of forgetting about it." Terming this option "nullification," Kenyon argued that it would be better to bypass legislative bodies "and concentrate upon public opinion, in the hope that some day the sentiment of the community may be strong enough to impress our enforcement officers" into nonenforcement. Kenyon's article stimulated considerable discussion. Birth control historian Norman Himes agreed that the key would be "the failure of prosecutors to bring cases before the courts," and attorney Alexander Lindley concurred: "nullification promises the only speedy relief." Morris Ernst [counsel to Margaret Sanger] saw it somewhat differently: "Nullification will take place by the constant whittling away of the law by judicial decisions." Birth control statutes "will not be repealed until they have already been nullified," Ernst predicted, but the essence of change would be judicial incrementalism: "Courts which are too cowardly to declare laws in conflict with our basic Constitution wheedle out of dilemmas by casting new interpretations on old statutes, eventually destroying the word of the law givers."[12]

Morris Ernst was prescient. As "doing constitutional interpretation [has become] a lot like making common law,"[13] "incrementalism" and "nullification" have become the way to void laws with which advocates of greater individual autonomy disagree.

Judging by the results, the strategy has been wildly successful. It was followed by promoters of legal abortion both before and after *Roe v. Wade*. Gay rights activists are utilizing an incrementalist approach on their way to seeking full parity for homosexual and heterosexual sexual activity, "lifestyles" and "unions." And Doctor

Jack Kevorkian and the pro-euthanasia crowd are having similar "incrementalist" successes in Michigan, where prosecutors and courts are divided over what to do about the man who many call "Dr. Death," and in Washington state, where a U.S. district judge has now decided that the "right to assisted suicide" follows inexorably from the logic of *Griswold* and *Roe*.

The only casualty has been the "rule of law" itself, but Justice Blackmun, who rarely has been constrained by it, would be proud! He had anticipated, as early as 1971, that the logic of the abortion right "would inevitably entail recognition of a right to commit suicide"[14] and Heaven knows what else.[15]

**Liberty, Privacy, and Autonomy: Just how far can the courts stretch the concept of "liberty"?**

**A. Defining the Issues**

*The limits of representative democracy*: One does not write a tome of nearly 1,000 pages about the most intractable political conflict of this century without having a point to make. Garrow is no exception. Though the focus of the book is on the personalities and struggles of those whose work led to the adoption by the Courts of a broadly-drawn concept of personal autonomy, the real story lies in what his larger-than-life characters actually believe should be done about laws with which they disagree.

Let us consider for a moment the problems which face any faction within the body politic which disagrees with either the substance or direction of the law. The principle of "one person, one vote" in a republican democracy would seem to indicate that the way to change the offending policy is to form coalitions that can make a compelling case to the legislature. But, as we all know, the "hard cases" which are used to justify broad reforms would rarely lead to good policy if a legislature were to adopt a "responsive" policy without a lengthy process of deliberation, log-rolling, and good, old-fashioned horse-trading (witness the "Clinton Health Plan").

In fact, the "checks and balances" built into the American system of constitutional government were *designed* to assure that the public policy-making process would be as messy, cumbersome and fraught with compromise as humanly possible. To win in the legislature, those devoted to a legislative cause must find allies, join coalitions, and use whatever clout they have to best advantage.

Abortion opponents know this fact of political life only too well.

So does Mr. Garrow. But unlike James Madison, who envisioned a political system which protects the interests of diverse political factions by making it hard for legislative majorities to pass legislation which does not have a broad base of public support, Garrow sees legislative inaction on controversial issues relating to individual autonomy as an outrageous abuse of power and public trust. If we are to be true to our nation's commitment to "privacy" and "liberty," we must, in Garrow's view, accept the fact that representative government has its limits.

Taken at face value, such a statement seems innocent enough. Of *course* democracy has its limits. It is limited by the text and structure of the original Constitution, by the text and structure of the Bill of Rights and subsequent amendments, and by "the law of Nature and of Nature's God." But these are emphatically *not* the kind of "limits" that Garrow, or the Supreme Court's "rights" jurisprudence since the late Nineteenth Century, have in mind.

**The Role of Judges**

Students taking "Con Law 101" are generally expected to be at least noddingly familiar with the debate over the role of judges in a pluralistic, representative democracy. That debate, which began even before the Constitutional Convention of 1787, is part and parcel of two of the most important principles of American constitutional law: federalism and the separation of powers.

As early as 1798, U.S. Supreme Court Justices Salmon P. Chase and James Iredell squared off on the issue of whether or not "An act of the legislature . . . contrary to the great first principles of the social compact, can be considered a rightful exercise of legislative authority."[16] Chase took the position that legislative acts which violated those "first principles" could not even be called "law," even though there might not be anything in the Constitution which would prohibit the passage of such a statute. Iredell disagreed:

> If any act of Congress, or of the legislature of a state, violates those constitutional provisions [which "define with precision, the objects of the legislative power, and restrain its exercise within marked and settled boundaries"], it is unquestionably void. If, on the other hand, the legislature of the Union, or the legislatures of any member of the Union, shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideals of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject; and

> all that the court could properly say, in such an event, would be that the legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. . . .[17]

For Garrow, however, arcane concepts such as federalism and separation of powers cannot be permitted to stand in the way of enlightened views on issues of personal autonomy. In his view, any doubts about that point were resolved when Robert Bork's nomination to the Supreme Court ran aground because liberals were able to paint him as a radical conservative who was unalterably opposed to the "right to privacy." The lesson we are to take from that particular morality play, he says, is that "any future nominee who has ever questioned the constitutional integrity or the political propriety of *Griswold* will suffer Bork's fate."[18]

Because no one, not even the most jaded judicial conservative, will argue that there is no "right to privacy" under the Constitution (the question is, rather, the limits on individual "autonomy"), it will be necessary to leave aside the distinctly revisionist nature of Garrow's fervent wish that the autonomy right recognized in *Griswold* should be used as "the Senate's litmus test for federal judges."[19] Unless we are committed to deflecting attention from what actually goes on in the "sacred precincts" of the judicial conference room, the appropriate focus of Senate confirmation hearings is, or should be, the role of judges—and their law clerks—in our constitutional government. For this, however, the reader needs just a bit of background which is, not surprisingly, missing from Garrow's narrative.

**How Judges (and their Law Clerks) Determine the Meaning of "Liberty" and "Autonomy"**

**B. The Fourteenth Amendment**

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part, ". . . nor shall any State deprive any person of life, liberty or property without due process of law; . . ."[20] Over the years, this guarantee has been given both a "procedural" and a "substantive" interpretation. On the procedural side, the Supreme Court has made it clear that the States must act with great care when taking action which has a substantial impact on personal rights of life, liberty and property. In practice, this usually means getting advance notice of an intended action, and having an opportunity to make a case in support or opposition. On the "substantive" side,

the guarantee is far broader. The Court now interprets it to include all rights it believes to be "fundamental."[21]

How do we know whether a right is "fundamental" or not? The Court, to its credit, concedes, that "These expressions are admittedly not precise, but our decisions implementing this notion of 'fundamental' rights do not afford any more elaborate basis on which to base such a classification."[22] So, unless we are to approach the question in the same manner that the late Justice Potter Stewart approached the definition of "hard core pornography"—"I know it when I see it"[23]—we will need a working definition of a "fundamental right."

There are two potential starting points. The first, and most obvious, is the text and structure of the Constitution and its amendments. The alternative, currently in favor with a majority of the Court, is found in the dissenting opinion of the second Justice John Harlan in *Poe v. Ullman,*[24] one of several cases filed in an attempt to invalidate the Connecticut birth-control statute. In a passage written by his then-clerk, Charles Fried, Justice Harlan opined that

> the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. . . .
>
> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to the Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard for what history teaches are the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[25]

This "definition" of what makes a right "fundamental" was adopted by a majority of the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey.*[26] It means that:

1. the full scope of the liberty guaranteed by the Due Process Clause *cannot be found in or limited by* the precise terms of the specific guarantees elsewhere provided in the Constitution;
2. "supplying of content to the Constitutional concept" of personal "liberty" which appears in the Due Process Clause of the Fourteenth Amendment

is the role of the United States Supreme Court;

3. the Supreme Court supplies that content by striking a "rational" balance between its view of the appropriate level of "respect for the liberty of the individual . . . and the demands of organized society," guided by our nation's "living" tradition; and
4. that the restraints on this judicial "balancing" process are *political*, not constitutional.

Because "the full scope of the liberty guaranteed . . . cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution," we need to know where else to look for them. After all, they must come from *somewhere.* So, the Court tells us, they come from the Justices themselves! A given "right" (*i.e.*, a claim to immunity from prosecution or other penalty) is "fundamental" if a majority of the Justices think that "the balance struck by this country, having regard for what history teaches are the traditions from which it broke" requires issues as varied as abortion, euthanasia, sodomy laws, capital punishment, gun control, race relations, and religious freedom, to be removed from the hurly-burly of power politics. The joint opinion of Justices O'Connor, Kennedy and Souter in *Casey* is explicit; in matters

> involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. *At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.* Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[27]

Since there are *lots* of matters which can be described as "intimate and personal choices" (*e.g.*, the decision to use drugs, or to sell one's body parts or fluids on the market), how are we to know when the Court will intervene? The Court makes it clear in *Casey* that its concern is the ability of its decisions to "survive"—a concern rooted in power politics, rather than constitutional law. Were the benchmark for legitimacy the balance struck by the Constitution rather than the Court's "beliefs about these matters," any decision which departed from it, "radically" or otherwise, would not simply be "unsound" or unpopular, it would be *unconstitutional.*

### *"And Who Will Judge the Judges?"* Looking at the Court's Record as a Proxy for "the Thoughtful Part of the Nation"

#### a. The Supreme Court on Race Relations: A Case Study in Moral Ambiguity

Since Garrow, Blackmun, and the authors of the joint opinion in *Casey* have been so effusive about the contribution the Supreme Court has made to our understanding of the concept of "liberty" over the years, it might be useful to consider the Court's track record. Even though the Court is often viewed (and certainly views itself) as the champion of the poor, the downtrodden, and the oppressed, its record over the long term is not a good one.

Let us consider briefly the three examples of judicial activism *outside* the field of "reproductive rights" which illustrate the inherent danger that lurks at the heart of any theory of judicial review which permits judges to disregard the language, structure, and history of the Constitution:

- *Dred Scott v. Sanford,*[28] the "central holding" of which relied on natural law principles and contemporary understandings of morality and politics to find that "[Persons of Black African descent] had for more than a century before been regarded as beings of an inferior order; and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; . . ."[29]
- *Plessy v. Ferguson,*[30] the "central holding" of which justified the doctrine of "separate but equal," and thereby gutted the Fourteenth Amendment's Equal Protection Clause, on the basis of what Justice Sandra Day O'Connor has called (in *Casey*) the social "facts-of-life" in the mid-1890s; and
- *Brown v. Board of Education,*[31] the "central holding" of which relied on the "social facts" of life in the mid-1950s to craft a morally and legally ambiguous position that condemned the "separate but equal" doctrine in public education, but permitted local school boards to retain it while they desegregated "with all deliberate speed."

**b. Race and the Supreme Court's Jurisprudence of "Social Fact"**

Whether or not the decision to sit in a train car reserved for whites can validly be described as one of "the most intimate and personal choices a person may make in a lifetime," there can be no doubt whatever that Mr. Plessy's decision to do so would forever be remembered as a "choice central to the personal dignity and autonomy" of millions of black Americans. He was, after all, a citizen, whose right to equal protection of the laws had been specifically guaranteed by a Fourteenth Amendment which was intended by the Reconstruction Congress to embody the moral principle that "all men are *created* equal." He assumed, as most ordinary citizens do, that the Supreme Court would be guided, if not by the principle of the inherent equality of human beings, then at least by the Constitution and laws of the

United States. He was wrong.

The reason that Mr. Plessy's "choice" of a seat on a train is relevant to a discussion of the Court's jurisprudence of autonomous "choice" is that both Mr. Garrow, and the Supreme Court itself, have attempted to wrap *Roe v. Wade* in the protective mantle of *Brown v. Board of Education*. This is smart politics, for *Brown* is a cultural icon, and Garrow quite rightly views it as "enshrined . . . for all time in America's constitutional pantheon." [32]

Politics aside, however, the maneuver underscores not only the shallowness of the Court's reasoning in *Casey*, but also the shallowness of its devotion to the "principles" upon which the Court was said to have relied in *Brown* itself. Virtually unnoticed by commentators discussing *Casey*'s "reaffirmation" of the "central holding" of *Roe* was the joint opinion's discussion of the present Court's reading of the actual basis for the decisions in both *Brown* and *Plessy*. Though the Court intended the discussion to serve as an explanation of why it was legitimate for the Court to overrule (albeit implicitly) the central holding of *Plessy* while retaining the "central holding" of *Roe*, the discussion reveals far more about the legal philosophy of the five justices who signed this part of the *Casey* opinion[33] than it does about either the theory or application of the doctrine of *stare decisis* in constitutional cases.

The key passage explaining why it was legitimate for the Court to overrule the "separate but equal" doctrine, but to reaffirm *Roe*, is reproduced below. It explains that *Brown v. Board of Education* and other important constitutional holdings the Court had jettisoned in the past

> rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. *As the decisions were thus comprehensible they were also defensible,* not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. *In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.*[34] [*Emphasis added.*]

What we learn from this passage is that the Constitution was just

as irrelevant to the decision in *Brown* as it was to the decision in *Plessy, Dred Scott* and, later, *Roe*. What was important, says the Court, was that the "facts, or an understanding of facts, [had] changed from those which furnished the claimed justifications for" *Plessy*'s holding that the doctrine of "separate but equal" was not an affront to the human dignity of the person.

The key phrases in this passage are those which emphasize "perception" and "understanding." According to a majority of the Court which decided *Casey*, the *Brown* decision "was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive."

This, of course, is utter nonsense. The Court that decided *Plessy* was actually quite explicit about its views on racial mixing. In fact, the opinion in *Plessy* speaks of black Americans in exactly the same haughty tones Garrow uses to describe Catholics and anti-abortionists. "The assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority," wrote Justice Brown, arises "not by reason of anything found in [the Jim Crow law at issue in the case], but solely because the colored race chooses to put that construction upon it." More to the point, he continued, "We imagine that the white race, at least, would not acquiesce in this assumption."[35]

The perception which "counted," according to the *Plessy* opinion, was not that of blacks and other Americans who took the principle of racial equality seriously, it was "the general sentiment of the community upon whom [civil-rights laws] are designed to operate"[36]—white folks who considered blacks to be inferior to them.

The *controlling* principle was autonomy. Said the Court: "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, *and a voluntary consent of individuals.*"[37] [*Emphasis added.*]

We know, of course, that racial segregation was just as insulting and immoral in 1896 as it was in 1954. So what had changed? The answer is simple: that "general sentiment of the community upon whom [civil-rights laws] are designed to operate." The Court which decided *Brown*, it appears, was confident that at least "the thoughtful part of the Nation could accept [the] decision to overrule [the] prior case as a response to the Court's constitutional duty." Nevertheless, it hedged its bets. Equity, said the Court a year later, required only

that the schools be desegregated "with all deliberate speed."[38]

It has not gone unnoticed in this fortieth anniversary year after *Brown* that it took nearly twenty years for the Court to realize that the "all deliberate speed" standard was a moral and legal farce. The Court, acting as a self-appointed proxy for the "the thoughtful part of the Nation" rather than in its capacity as a court empowered by *all* the people to enforce their sovereign will, had tolerated Jim Crow laws and the damage they wrought for nearly a century. We are still cleaning up their mess.

But the Court in *Casey* does not stop here. It wants us to accept a proposition which guts the very Constitution it claims to be enforcing. The majority writes that

> as the decisions were thus comprehensible they were also defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before.

Now this is truly a novel proposition. Constitutional decisions do not become "defensible" merely because they are "comprehensible . . . as applications of constitutional principle to facts as they had not been seen by the Court before." They are "defensible" only to the extent that they are supported by the Constitution.

The *Casey* Court admits that *Plessy*[39] was wrongly decided "the day it was decided," but its reasoning is both morally and intellectually dishonest. The *Plessy* Court *was* aware of the "facts of life." It *explicitly* recognized that arbitrary decisions based on race harmed everyone affected by them when it opined that any attempt by Louisiana to exempt from civil damages conductors who guessed "wrong" about the race of a passenger would be unconstitutional. The only thing it could not foresee was the *amount* of harm that officially-sanctioned segregation would engender in our society.

That race discrimination was harmful to everyone simply did not matter to them. Like the Justices in *Roe* and *Dred Scott*, the Justices in *Casey* and *Plessy* were about a different task: protecting the sacred principle of individual autonomy from "zealots" who hold the religiously-inspired view that all human beings actually *are* "created equal," informed "scientific" understanding to the contrary notwithstanding.[40] They voided much of the legislative handiwork of the "religiously-inspired" Abolition movement, and most of the "religiously-inspired""New Deal"on precisely the same grounds.

The fallacy of Garrow's book, and of the *Casey* Court's defense

of *Roe*, is that they assume it is preferable to argue the case for individual autonomy before a sympathetic judge with life tenure rather than to legislators whose primary concern is surviving the next election. Efficiency, however, has its price: the "benefits" of judicial activism are purchased at very high cost; and it is payable over generations.

A regime in which legal obligations are contingent because "changed circumstances may impose new obligations" is not the constitutional order that all judges, state and federal, have sworn to uphold. If judges are unconstrained by the Constitution, they are free to "create" rights and immunities that the Constitution does not recognize. Unconstrained by the Constitution, they are also free to negate or suspend rights which it *does* recognize.

The legacy of the cases in which the Court has stepped in to "nullify" laws or constitutional provisions duly adopted by popularly-elected legislatures has been a sorry one. *Dred Scott* "nullified" the Missouri Compromise because the Court did not feel that the country was ready to accept the proposition that legal and moral duties are not contingent upon skin color or continent of origin. *Plessy* "nullified" the Equal Protection Clause of the Fourteenth Amendment because the Court did not feel that the country was prepared to accept the proposition that official segregation (*a.k.a.* apartheid) "stamps the colored race with a badge of inferiority." And *Roe* "nullified" the will of those political communities which had concluded that the lives of unborn human beings are deserving of at least *some* protection from the law.

Judicial activism thus cuts both ways. When *explicit* constitutional rights like "equal protection of the laws," the right to life, or the Ninth Amendment right of political *communities* (not the Court) to recognize rights beyond those enumerated in the Constitution are contingent upon the ability or political willingness of what Justice O'Connor has called "the thoughtful part of the Nation [to] accept" them, they exist only insofar as they are acceptable to "thoughtful," elite groupings such as the one which gathered so long ago at the Farmington Country Club. Moral and legal obligations, including those enshrined in the Constitution itself, count for nothing.

Some "pro-life" advocates know this, but they too have accepted the theory that the Constitution should reflect the moral views of "the majority"—they simply disagree with "pro-choice" advocates over which "majority" should be counted as the "real" one.

The fact is, there will be no change in the constitutional *status quo* until anti-abortionists abandon the commonly-held view that *Roe v. Wade* is "the problem." It isn't. *Roe* is merely the Court's "take" on the views of the "thoughtful part of the Nation" concerning abortion, and it will remain that way until abortion opponents convince the public, and through it the Court, that times—and attitudes toward the unborn and persons with severe disabilities or terminal conditions—have changed. It took Margaret Sanger and her followers over fifty years to change the *status quo*. It's going to take the anti-abortion movement at least that long.

**Conclusion**

Much of what Garrow has written is depressingly familiar to any reader who knows either the law, or the political and social dynamics of the struggle over abortion. Nonetheless, his book serves to underscore a point often forgotten (or never learned) by those who mistakenly believe that the battle over abortion will be over if only they can make an effective case for the humanity of the unborn child. Garrow's history proves, if anything, that a showing "of the well-known facts of fetal development" would be deemed to be just as beside the point by those who believe that autonomy is the first principle of constitutional law as it was to the Court which decided *Roe. Liberty and Sexuality* demonstrates beyond a shadow of a doubt that "pro-life" forces are involved in an old-fashioned, high-stakes game of hardball politics, and that they are opposed by well-financed professionals who understand the power of symbol, the limits of democracy, the need to dominate federal and state judiciaries, and the importance of what former President George Bush once called "the vision thing."

For Garrow, the "visionaries" are birth-control crusaders Margaret Sanger, Kit Hepburn (Katherine's mother), Sally Pease and Estelle Griswold of the Connecticut Birth Control League; lawyers, like Lawrence Lader, Fowler Harper, Harriet Pilpel, Sarah Weddington and Margie Pitts Hames; judges, like Harry Blackmun, Arthur Goldberg, and William Brennan; abortionists like Massachusetts' Bill Baird, New York's Alan Guttmacher, and Minnesota's Jane Hodgson; the Connecticut Republican Party, and Joseph Sunnen, the St. Louis-based contraceptive foam manufacturer who financed much of the struggle.

The villains are the usual suspects: the Roman Catholic Church and those in sympathy with what he clearly considers to be its intellectually-benighted and theologically-reactionary world view,[41]

such as the Knights of Columbus and the National Right to Life Committee. Back in the days when it sought to protect the interests of the working poor from upper-crust, Republican-style social engineers, the Democratic Party was also on Garrow's hit list.

These are, in Garrow's world at least, the forces of darkness and reaction, whose intellectual credentials and legal positions are belittled at every turn.[42] They are the antithesis of the heroes and heroines of Garrow's story—the enlightened folk whose views on personal autonomy consistently play to such mixed reviews in state legislatures and referenda—they are "the thoughtful part of the Nation." They are, to borrow a phrase from the (thankfully) now-retired Supreme Court Justice Harry Blackmun, the forces of "light."[43]

What lessons can abortion opponents take from this book? Perhaps the admonition that "winner's justice" carries with it the promise of a double standard. It will not matter to the forces of "light" that their heroines utilized the very same sort of moral argumentation or tactics as their hated adversaries; it is the justice of their position which determines the legitimacy of their actions. It will not matter that mainline Protestant clergy have condemned, in the most religious of terms, the Catholic position as the wholesale "imposition" of "one faith" on a diverse community. The views of the Catholic Church concerning abortion and birth control will continue to be dismissed out of hand as "religiously-based" and, therefore, illegitimate subjects for public discourse. The civil disobedience of ministers who opened abortion and birth-control programs, and the intentional disregard of the law by Connecticut Planned Parenthood's Estelle Griswold and abortionists Bill Baird and Jane Hodgson (all three of whom *wanted* to be arrested) will be viewed as "different" in kind, and therefore justifiable.

*Why* is this so? Virtually every page of Garrow's book tells us. Catholics and their "pro-life" fellow-travelers are hypocrites. They use contraceptives when it serves their purposes, they have abortions when the situation demands it, and they are murderers with the blood of abortionists on their hands. Unlike the enlightened, upper-crust Democratic and Republican ladies and gentlemen who have done so much to legalize abortion, sodomy, physician-assisted suicide, and euthanasia—indeed, to make them a part of our national patrimony—"pro-lifers" are "terrorists." Like Catholics, they are not the kind of people "the thoughtful part of the Nation" can trust to deal "rationally" with either liberty or sexuality. Their "morals" get in the way.

## NOTES

1. David J. Garrow, *Liberty & Sexuality: The Rights of Privacy and the Making of Roe v. Wade* (New York: Macmillan, 1994), 981 pp., $28.00, p. 705 [hereafter, cited as *Liberty & Sexuality*].
2. Robert G. Marshall & Charles A. Donovan, *Blessed Are the Barren: The Social Policy of Planned Parenthood* (San Francisco: Ignatius Press, 1991), pp. 9-10, 275-281.
3. The phrase is borrowed from James Davison Hunter's book on the more recent manifestations of the rift between what he terms "the orthodox" and "the progressives, and the manner in which it plays out in the context of the abortion issue." James Davison Hunter, *Culture Wars: The Struggle To Define America* (New York: Basic Books, 1991).

   Garrow reports that Judy Smith, the woman who recruited Sarah Weddington to argue *Roe v. Wade*, was of the view that:

   > "We in Women's Liberation," she explained, "deny any inherent differences between men and women and regard everyone as human beings with the same potential. All of us are trapped by the society that created our roles," and those confines had to be torn down. "We are questioning the ideals of marriage and motherhood," and in the process "the very society that has created these roles and values must also be questioned." Several weeks later the group published a second piece in *The Rag*, entitled "Why Women's Liberation?," and explained that part of the answer was that "Women's problems are rooted deep in society, and women's liberation cannot be successful until much of what is wrong with society is corrected. The task is almost too great to be contemplated. Yet there is freedom in the striving," *Liberty & Sexuality*, p. 390.

   These views are consistent with one of the several schools of thought within contemporary feminism which take the view that abortion rights are critical to the liberation of women. The joint opinion of Justices O'Connor, Kennedy and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2809 (1992), also takes this position:

   > for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. See, e.g., R. Petchesky, *Abortion and Woman's Choice* 109, 133, n. 7 (rev. ed. 1990). The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.

   The debates within the feminist camp over the relevance of biology to the "construction" of sex roles in society are fascinating topics in their own right, but they are very much beyond the scope of this review. These debates are, however, topics with which informed pro-life advocates should be familiar. A good primer on the subject is Amy Miller, J.D., "Against the Tide: Pro-Lifer as Feminist," *Respect Life*, 1993 (Washington: NCCB Secretariat for Pro-Life Activities).
4. 381 U.S. 479 (1965).
5. *Liberty & Sexuality*, p. 190.
6. The Ninth Amendment provides that: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." Though intended as a limit on federal judicial power to decree that the Bill of Rights was to be taken as the "exclusive" list of civil and political rights, there is an extensive literature on the Ninth Amendment as a justification for *expanding* federal judicial authority to invalidate State legislation deemed inconsistent with "unenumerated rights."

   This is precisely what happened in *Roe v. Wade*, where the Court held that Texas could not take steps to increase the level of legal protection afforded to unborn children because such steps violated the unenumerated right of a woman to terminate a pregnancy. Interestingly, the Ninth Amendment was utilized by both sides in the case. Sarah Weddington argued the now-familiar position that protection of the unborn was inconsistent with the existing rights of the woman. Dorothy K. Beasley, counsel for the State of Georgia in *Doe v. Bolton*, argued that the Ninth Amendment protected the right of the fetus "to be left alone." *Liberty & Sexuality*, p. 571-72.

   The literature on the Ninth Amendment is extensive. See, *e.g.*, "Symposium on Interpreting the Ninth Amendment", 64 *Chi-Kent L.Rev.* 37-168 (1988); Sager, "You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth, But What on Earth Can You Do With the Ninth Amendment?", *Id.* at 237; *The Rights Retained By The People: The History and Meaning of the Ninth Amendment* (R. Barnett ed., 1989); C. Black, *Decision According To Law* (1981). A notable exception is Professor Calvin Massey's recent article, "The Anti-federalist Ninth Amendment and its Implications For State Constitutional Law", 1990 *Wis. L. Rev.* 1229. Not only is Professor

Massey's thesis an interesting one, it contains an extremely useful collection of the literature. *See*, Massey, *supra*, 1990 *Wis. L. Rev.* 1229-39 & n. 2 (discussing the academic literature).

7. The pretrial attitude of United States District Judge Sarah Hughes of Dallas, famed for administering the presidential oath of office to Lyndon B. Johnson after the assassination of John F. Kennedy and one of the three judges to whom *Roe v. Wade* was argued, is described as follows:

   > Only one member of the three-judge panel, Sara Tilghman Hughes, had given much thought to *Roe v. Wade* in advance of the May 22 hearing. One of her two clerks, Randy Shreve, had been assigned to pull together relevant materials in addition to the spotty briefs that made up the case's formal record, and Shreve had gone to the extent of calling Roy in New York to ask for information. Lucas [who was, by then, actively involved in pro-abortion advocacy] sent off a package of what he termed "numerous articles and briefs to which you may or may not already have had access," but whether or not Shreve was cognizant of it, Sarah Hughes already knew full well what she thought of the substantive issue posed by *Roe v. Wade*. Asked later whether she had had a personal opinion on the question prior to hearing the case, Hughes answered frankly that "Oh, well, I was in favor of permitting abortion." *Liberty & Sexuality*, p. 440.

8. *Liberty & Sexuality*, p. 15.
9. Kathleen Sullivan, Book Review, "Liberty and Sexuality: The Right to Privacy and the Making of *Roe v. Wade*," *The New Republic*, vol. 210, no. 21 (May 23, 1994), p. 42.
10. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791, 2813 (1992). Garrow quotes, with obvious approval, the opinion of Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit in *Watkins v. United States Army*, 837 F.2d 1428, 1457 (9th Cir. 1988) (Reinhardt, J. dissenting). "Reinhardt predicted that in time 'history will view [*Bowers v. Hardwick*] much as it views *Plessy* [*v. Ferguson*],' the Supreme Court's infamous 1896 endorsement of racial segregation, and said that he was 'confident that, in the long run, *Hardwick*, like *Plessy*, will be overruled by a wiser and more enlightened Court.'" *Liberty & Sexuality*, p. 686.
11. *Liberty & Sexuality*, p. 711.
12. *Liberty & Sexuality*, p. 26.
13. Kathleen Sullivan, *op. cit.*
14. *Liberty & Sexuality*, p. 478 [recounting the oral argument in *United States v. Vuitch*, 402 U.S. 62 (1971)].
15. See, *e.g., Donaldson v. Van de Kamp, Attorney General*, 4 Cal. Rptr. 2d 59 (Ct. App. 2d Dist., Div. 6, 1992) (rejecting the proposition that there is an autonomous right to commit suicide in order to have one's body cryogenically preserved in the hope that future advances in medical science might provide a means to cure a person with a presently incurable illness).
16. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388, 1 L.Ed. 648 (1798) (opinion of Chase, J.).
17. *Id.*, 3 U.S. (3 Dall.) 398-399 (opinion of Iredell, J.).
18. *Liberty & Sexuality*, p. 671.
19. *Liberty & Sexuality*, pp. 668-72.
20. U.S. Const. amend. XIV, Section 1 (1868).
21. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). (a right is fundamental if it is "implicit in the concept of ordered liberty"); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). (a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.").
22. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S.Ct. 2791 (1992).
23. Concurring in *Jacobellis v. Ohio*, 378 U.S. 184, 187, 197, 84 S.Ct. 1676, 1677, 1683, 12 L.Ed. 2d 793 (1964), wrote that criminal prosecution in the obscenity area is constitutionally limited to prosecution of "hard-core pornography." He went on to say:

   > "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it and the motion picture involved in this case is not that."

24. *Poe v. Ullman*, 367 U.S. 497 (1961).
25. *Poe v. Ullman*, 367 U.S. at 542 (Harlan, J. dissenting).
26. —U.S.—, 112 S.Ct. 2791, 2806 (1992).
27. *Id.* 2807.
28. 60 U.S. (19 How.) 393 (1857).
29. *Id.* 60 U.S. at 407, 410, 416. This holding was overturned by the Citizenship Clause of the Fourteenth Amendment. U.S. Const. Amend. XIV § 1 (1868).
30. 163 U.S. 537 (1896).
31. *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).
32. *Liberty & Sexuality*, p. 705.
33. O'Connor, Kennedy, Souter, Blackmun and Stevens.
34. *Casey*, 2813 (*emphasis added*).

35. *Plessy*, 163 U.S. at 551.
36. *Id.*
37. *Id.*
38. *Brown v. Board of Education* (II), 349 U.S. 294, 301 (1955) (remedial phase: "all deliberate speed").
39. 163 U.S. 537 (1896).
40. Bemoaning "the dwindling medical commitment" to abortion training and performing abortions among today's young physicians, Garrow notes that "the scientific consensus regarding abortion appeared sturdier than ever before." He quotes with approval the current "scientific" theory concerning what is, essentially, a value judgment: "The question of when the fetus acquires humanness," two even-handed experts explained, "comes down to this: When do nerve cells in the brain form synapses?" *Liberty & Sexuality*, p. 683 & n. 115.
41. Although virtually *all* the villains in Garrow's book are identified as "Roman Catholics," there is one notable exception: the Connecticut Supreme Court, which consistently rejected the proposition that judges should take matters into their own hands when a legislature seems unable to reach a consensus on hotly-contested political issues. In a passage which stands in stark contrast to Garrow's praise of the activists drawn from the ranks of the Yale law and medical faculty, which flatly contradicts his assertion that the Birth Control "league's best political chance lay in obtaining firm support from the Republican party" (*Liberty & Sexuality*, p. 89), he tells us that "the composition of the Connecticut Supreme Court offered few reasons for optimism." The reason: "Four of the five justices had attended Yale Law School, and the fifth, Harvard, and four were Congregationalists and the fifth a Baptist, but it was not an aggressive or creative court. The two youngest members were each fifty-seven years of age, all five justices were Republicans. . . ." *Id.*, pp. 75-76.
42. Typical of Garrow's sneering style is his description of Fordham University law professor Robert M. Byrne, who is described as "a prolific Roman Catholic critic of any form of abortion law liberalization" and "a forty-year-old bachelor who still lived with his mother [in 1970]." *Liberty & Sexuality*, p. 522. But not all Catholics belong, like Byrne, to the "power group of zealots" who oppose abortion. Those who support either abortion itself, or a totally passive role for both abortion opponents and the Church itself, are singled out for their "courage" in the face of severe criticism by their co-religionists. Rev. Robert F. Drinan, S.J., who had argued that repeal of abortion laws is preferable from a moral point of view than "reforms" which would place the State in the unenviable position of deciding which children are eligible to be born (a view which I share) is given special attention because of the role he played in undercutting the Catholic opposition. Garrow applauded him as "far more influential than many observers yet realized" in 1969, and quotes with approval Drinan's wholesale capitulation on the role of church leaders in the abortion issue. *Id.* p. 421.
43. The term is drawn from Justice Blackmun's concurring opinion in *Casey*:

> Three years ago, in *Webster v. Reproductive Health Serv.*, [citation omitted], four Members of this Court appeared poised to "cast into darkness the hopes and visions of every woman in this country" who had come to believe that the Constitution guaranteed her the right to reproductive choice. [citations omitted].
>
> All that remained between the promise of *Roe* and the darkness of the plurality was a single, flickering flame. Decisions since *Webster* gave little reason to hope that this flame would cast much light. [citations omitted]. But now, just when so many expected the darkness to fall, the flame has grown bright.

*Casey*, 112 S.Ct. 2791, 2844 (1992) (Blackmun, J. concurring).