THE WALL STREET JOURNAL THURSDAY, MARCH 3, 1994

The Road to Roe

By Rita J. Simon

In "Liberty and Sexuality" (Macmillan, 981 pages, $28), David Garrow takes us on a carefully detailed, excessively long 50-year journey through bedrooms, courts and doctors' offices that ends, inevitably, with the 1973 Supreme Court decision in Roe vs. Wade.

Mr. Garrow begins in 1923, describing the social movement that sought to repeal a Connecticut statute passed in 1879 that forbade trafficking in "obscene literature and materials concerning sex, reproduction, and the use of any drug, medicine, article or instrument, for the purpose of preventing conception."

Initially, the movement's leaders were largely members of the New England aristocracy who were worried about the number of unwanted children born to poor, ethnic and immigrant women. The movement, which had a strong anti-Catholic bias, came to a temporary halt in March 1940 with the Connecticut Supreme Court decision (Connecticut vs. Roger B. Nelson, et al.) that upheld the 1879 statute. In a 3-2 ruling, the majority commented that "it is to the legislature, not the judiciary, to which appeals to overturn the 1879 statute should be made."

After a recess for World War II, the birth-control movement re-entered history on June 19, 1954, when the Supreme Court handed down its 5-4 decision in Poe vs. Ullman. Again, that decision upheld the 1879 Connecticut statute by a single vote. In his dissent, Justice John M. Harlan observed that "a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's private life."

As Mr. Garrow notes, it was the wording of Harlan's dissent, with its focus on the right to privacy, that laid the groundwork for the eventual victory over the 1879 statute. Looking much further down the road, that dissent also opened the debate that led to the decision almost 20 years later in Roe vs. Wade. And it was Justice Harlan's dissent that was praised by the media. Editorials found the dissent "powerful and persuasive" and the majority opinion "puzzling and regrettable."

But before considering the right of a woman, married or single, to end her pregnancy, the Supreme Court had to determine the right of married women to use contraceptives. That happened in 1965, when the Supreme Court held by a 7-2 margin in Griswold vs. Connecticut that the 1879 statute violated the right to privacy. Estelle Griswold, director of the Connecticut Planned Parenthood League, and medical colleague Lee Buxton had won a 42-year struggle to make birth control legal. Depending on which justice's opinion you read, the privacy right was created out of the Third, Fourth, Fifth, Ninth or 14th Amendment.

The stage was now set for the debate over abortion. It was a struggle organized, led and eventually won by professionals from the American Civil Liberties Union, law-school faculties and experienced courtroom litigators, aided by doctors, a recently formed feminist movement and opinion polls. According to those polls, in 1969 40% of the American public favored a law that would permit first-trimester abortions; by 1972, 64% believed the decision to have an abortion should be made solely by women and their physicians. These views were held equally by men and women.

In the end, the decision was made by the courts. Those who tied their strategies and hopes to state legislatures experienced setbacks and frustrations. At least 17 states introduced abortion-reform bills and all of them failed to gain adoption.

Mr. Garrow devotes page after page to describing the behind-the-scenes maneuvering by the Supreme Court justices and their clerks, and the changes that developed between the first draft of Roe vs. Wade and the version finally accepted by the seven-justice majority. As Justice Harry A. Blackmun stated in his 51-page majority decision, it was the right to privacy as gleaned from the wording in the 14th Amendment on which the court hung its decision.

The decision came too late for Norma McCorvey (the Jane Roe of Roe vs. Wade). Mr. Garrow reports her reaction to the court's decision as "happy, sad and mad." By then, she had given up for adoption the child she had been forced to bear.

In telling his story, Mr. Garrow spares his readers few details. Conversations are reported at length with women who underwent abortions, with physicians who found themselves in trouble with hospital administrators, with attorneys who argued about substance and style, and most of all with Supreme Court clerks and the justices for whom they worked. We learn, for example, that the clerks were very annoyed by Justice Byron White's dirty play during basketball games in the court's gym.

One can skip tens of pages and still pick up the main thrust of the narrative. In the end, with all the advances and setbacks, Roe vs. Wade became the law of the land. It was not a dramatic, revolutionary decision that caught an innocent public by surprise.

To this reader, Mr. Garrow offers too many details, too many insider stories. Even so, "Liberty and Sexuality" is an important book that may turn out to be the definitive history of the right to privacy and the right to abortion.

Bookshelf

"Liberty and Sexuality"
By David Garrow

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