In Control of Her Own Destiny:

Catherine G. Roraback and the Privacy Principle

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In reviewing the fleet of precedents that supported the Supreme Court's recent decision in *Lawrence v. Texas*, Justice Anthony M. Kennedy wrote "the most pertinent beginning point is our decision in *Griswold v. Connecticut*." Catherine Roraback '48 was one of the lead attorneys on *Griswold*, and a series of cases that led up to it. In this article, she recalls how this landmark case was built.

Catherine Roraback runs a solo practice in Canaan, Connecticut, a small town that has barely outgrown the term village, perched in the northwest corner of the state. Her grandfather founded the practice in 1873, and Roraback took it over in 1955 after the death of her uncle. "It's a big root," she says to describe her family connections to the area.

She no longer goes to court—she says she's used up her lifetime's allotment of adrenaline—but still sees clients, especially "people who are sort of family clients. People who always come to this office." Her desk, table, and cabinets are stacked with

papers—deeds, filings, complaints, letters, wills—as she still conducts all her correspondence via letter. "This office is filled with papers, and I don't want people to see them, because it's the most intimate details of people's lives.... I have never gone on email just because I got so conditioned on privacy issues."

"Privacy" is an especially meaningful word for Roraback. The most important case of her litigating career was *Griswold v. Connecticut*, the Supreme Court case that first identified a constitutional right to privacy in 1965. The case became a foundation for later decisions with national impact, like *Roe v. Wade* and the recent *Lawrence v. Texas*.

Roraback became involved in the lineage of legal action that led to *Griswold* in 1958, when Yale Law School Professor Fowler Harper called and asked for her help, because he wasn't a member of the Connecticut bar. Harper had already met with Estelle Griswold, the executive director of the Planned Parenthood League in Connecticut, and Lee Buxton, a Yale obstetrician—also the two people who years later became plaintiffs in the cases subsumed under *Griswold*—about bringing a challenge to Connecticut's anti-contraception law.

This Connecticut statute was the only one in the nation to ban both the sale and the use of contraceptive devices or medicines. It had been enacted in 1879, under the sponsorship of P. T. Barnum, the circus promoter, who was then serving in the Connecticut legislature. It had a contentious history through the twentieth century, challenged at almost every biennial meeting of the Connecticut legislature in frequently vituperative debates. Roraback reports that Buxton returned shaken from his experience testifying in front of a legislative hearing on the subject. But the law survived, in part because of the strong support of the Catholic Church.

Poe v. Ullman, as the case came to be known, was conceived by Griswold, Buxton, and Harper as an alternative to the fruitless legislative action. Roraback adds some detail: "Estelle got Fowler Harper and Lee Buxton to her house. I was always told this story. She served them martinis—and I can tell you they were some of the more powerful martinis...and between them they agreed that there ought to be litigation."

To set up the litigation, Buxton recruited as plaintiffs married women whose lives could be endangered by pregnancy. In addition, Harper brought in a young married couple, one of whom was a student at YLS. At the time, Roraback says, they were only hoping to convince the Connecticut courts to carve out an exception in the law for women who needed contraceptives for medical reasons.

Roraback arranged for these cases to be brought under pseudonyms. She filed affidavits stating who each plaintiff was but had the records sealed, and she promised her clients that she would warn them if their identity was going to be revealed. If necessary, says Roraback, "I would then withdraw the case to protect them, because in those days it would have been socially very difficult. I got the court's permission to handle it that way....I invented a procedure and, afterwards, lawyers from all over the state would call me to find out how I had done it." Decades after the cases were concluded, Roraback remained protective of her clients and refused a curious author access to her files. "He went out and found out the names and published them in his book, which has always griped me."

Buxton himself was also a plaintiff, arguing that the law infringed his right as a doctor to give his patients complete and honest medical advice. In 1958 and 1959, Roraback argued the cases through the Connecticut courts, which upheld the statute, until their appeal was accepted by the U.S. Supreme Court, when Harper took over as lead attorney.

Harper did bring up privacy arguments in his brief for *Poe v. Ullman*, writing that the Connecticut statutes "invade the privacy of the citizen...[and] the privacy of the home," but Roraback says their legal team didn't believe these issues could be deciding. The Court ruled against Roraback, Harper, Griswold, and Buxton, by five votes to four, on the grounds that the statute was not enforced, meaning there was no controversy. (Roraback still argues that this was a mistake.) Two dissents, written by Justices William O. Douglas and John M. Harlan, picked up on Harper's privacy argument, and would become pivotal parts of the *Griswold* case.

Undaunted by this setback, the principal actors in the *Poe* case decided to carry forward their challenge to the Connecticut ban on contraceptives by opening a Planned Parenthood clinic in New Haven. Roraback says that this maneuver

has been often misunderstood. "Most people said that opening the clinic was just to get an arrest....That wasn't really true at the time we did it. It might or might not be an arrest." Roraback says that public opinion on the issue of birth control had shifted significantly in the years leading up to the 1961 opening of the clinic and the trial that followed. Perhaps most importantly, after the Second Vatican Council began, the Catholic Church withdrew its vociferous official support for the Connecticut law. "When we opened the clinic, there was no organized opposition to it," says Roraback.

And there might not have been any arrests if not for the protests and agitation of one man, James Morris, who believed that the clinic was immoral and illegal. "He was picketing the clinic with signs that looked like some of the modern day anti-*Roe v. Wade* signs," Roraback recalls. Eventually the district attorney and the police felt compelled to act. Roraback met with the chief circuit court prosecutor, Julius Maretz (also a YLS graduate), before the arrests. "One thing I didn't want him to do was go into the clinic and arrest people and seize the records," she says. "He said, 'I won't be able to prove the case unless I have somebody.' So I said, 'If I talk to some of the patients at the clinic, and they are willing for me to turn their names over to you, would that do it?' He said yes. I did that. I gave him his case, his witnesses, in order to protect the patients' records."

Estelle Griswold and Dr. Lee Buxton were charged with misdemeanor counts of abetting the use of birth control. Again Roraback primarily handled the legal work going up through the Connecticut courts. Even though the charges were minor, there was a trial, since Roraback and the other lawyers in the case wanted a complete record in anticipation of arguments in front of the Supreme Court.

"A very funny thing happened," Roraback laughs as she remembers. "Lee Buxton was an internationally known expert in his field, and so when he was testifying on the witness stand, I had gone through his CV, and I asked him what his field of specialty was, and it was infertility. So I had put that in the record. When I got the transcript of the trial—and this transcript was sure to go to the U.S. Supreme Court—the court reporter had put down 'infidelity.' I had the transcript corrected before I filed it."

Roraback pauses in her narration of the case to point out that all the way through the trial, the courts and the press assumed that they were challenging the Connecticut statute on behalf of married people only. "This is something the younger generation doesn't understand," she says. "But back in the '50s, I can tell you that although doctors were prescribing to women, it was always to married women....Most of the younger women would go to a place like New York City to get their contraceptives, but even in the New York clinic there was a need to be a married person, in quotes. I can remember people borrowing a ring to go to New York."

After Buxton and Griswold were convicted at trial, Roraback vigorously shepherded the case through the Connecticut courts, urging it past sometimes-lackadaisical prosecutors and often-unresponsive judges, filing brief after brief, appeals, petitions, affidavits. The conviction was upheld by the state circuit court of appeals. Roraback reads a section of the 1963 decision to further underscore how different some mores were at the time: "It is not alone for the preservation of morality in the religious sense that the legislature may have been impelled to act, but also for the perpetuation of race, and to avert those perils of extinction of which states and nations have been alertly aware since the beginning of recorded history." She adds, "It was funny even then to me. But now it's unbelievable."

The Connecticut Supreme Court also found against Buxton and Griswold, holding the Connecticut statute constitutional. They appealed to the U.S. Supreme Court and the case was accepted for review on December 7, 1964.

Roraback notes that as the *Griswold* case slowly progressed, privacy was becoming a matter of public concern and discussion. She mentions the invasions of privacy that occurred in the 1950s, with the McCarthy hearings. Then came the prominence of the U2 spy plane. "Suddenly you thought that up in the sky somebody might be photographing you doing something that you wanted to keep to yourself," she says. And computers had become a novel threat. Roraback made speeches in that period about the risk that computers could create centralized health records that would be easier to access than scattered paper files.

In 1964, she knew privacy was also of interest to the Court, not only from the dissents in *Poe*, but also from a search and seizure privacy decision handed down the same day as *Poe*, *Mapp v. Ohio*. "Naturally as we went up on *Griswold*, privacy became integrated into the arguments, but it wasn't the only argument, and I don't think any of us really thought *Griswold* would get decided on privacy." In part, this was because Roraback was focused on the labor of getting the case through the courts. "I thought [the privacy argument] was interesting, but you know, you're busy working on a case, you don't engage in light speculation."

Privacy was only part of a broader claim, leaning on the 14th Amendment, that the Connecticut statute deprived people of liberty without due process. In fact, Roraback kept adding arguments to her case as she found out about them. As she was working on the brief for the Connecticut appel-

late court, Harper called her urging her to incorporate an argument just published in the *New York University Law Review* about the Ninth Amendment's applicability to the right of privacy. Roraback recalls, "I said, 'But we haven't raised it.' And Fowler said, 'Well you ought to be able to get it in the brief.'"

By the time *Griswold* reached the high court, Fowler Harper was incapacitated by illness, which would lead to his death within months. Harper's YLS faculty colleague Thomas Emerson '31 took over as lead litigator. He argued *Griswold v. Connecticut* in front of the Supreme Court on March 29, 1965, with Catherine Roraback sitting beside him at the counsel's table.

The decision was handed down on June 7. It was the first time the Supreme Court found a right to privacy in the provisions of the Constitution. *Griswold* also extended constitutional liberty into the sphere of human sexuality—a protection that was expanded in subsequent decisions, from *Eisenstadt v. Baird* and *Roe v. Wade*, through 2003's *Lawrence v. Texas*. Roraback recalls reading the *Griswold* decision, with its emphasis on the right to privacy, for the first time: "It was tremendous....It was an expression of the concerns of the time but it was also, I think, greeted with...great interest. The literature that was written from that time on was unbelievable, developing it in various ways."

Roraback (center) seen leaving court in New Haven in 1972, in a photo from the Waterbury Republican *newspaper.*

Roraback was also aware that the final decision, which has now been solidified as precedent and monumentalized in history books, depended on innumerable twists of chance. For instance, the Ninth Amendment argument she had included late in the process became the basis of Justice Arthur J. Goldberg's concurring opinion. But Roraback knew that, because she added it after the initial trial, "It hadn't been raised properly—anyway it became the basis of one of the major decisions of that case."

Roraback says she has one regret at the resolution of her campaign against the anti-contraceptive laws. At the Connecticut Supreme Court level she had argued that the right to life and liberty protected not only the narrowest interpretations of those terms—mere animal existence and a freedom from bondage—but a full enjoyment of all one's faculties, which would certainly include the intimacies of the marital relationship. She preferred this argument to privacy in some ways. "Privacy is a much more negative thing, 'Don't do it to me,' not saying, 'I've got a right to do it.'" But this argument wasn't raised at the U.S. Supreme Court. "If they bought privacy, they might have bought that too," she speculates.

Roraback estimates that she devoted nearly half of her time over seven years to this string of cases. All the while, she made a living running her New Haven-Canaan solo practice with divorces, criminal defenses, and real estate transactions. "Sometimes I didn't get much sleep. I had a very busy life."

She took numerous other pro bono cases throughout her career. She defended peace demonstrators and conscientious objectors, and handled a Connecticut Smith Act trial. She also represented a defendant in the New Haven Black Panther trial.

After *Griswold*, Roraback led a string of cases challenging Connecticut's anti-abortion law, eventually leading to its invalidation in 1973. She picked up on some of the life and liberty arguments that had been jettisoned in *Griswold*. "We started developing some of these ideas that a woman has a right to control her own destiny, which was what I thought the right to life and liberty were really about."

Roraback emphasizes how the abortion cases, as well as the earlier birth control cases, grew out of the women's movement. "*Roe v. Wade* didn't come out of the skies. I think there's a tendency when you are in law school studying law not to think of the context in which a case arises." In the Connecticut abortion cases, Roraback represented 1,850 women plaintiffs. All of the lawyers who worked on the case were also women, as were all of their witnesses. And this was in what Roraback calls "a very patriarchal, chauvinistic system," where nearly all of the judges were men and women litigators were a rarity. In fact, handling the women's cases caused Roraback to look more closely at her own position in the system. "The women's movement changed me too....They were younger women but they made me look at myself."

Roraback's close participation in so much of this history doesn't mean she can answer every question about it, though. About her most famous case, she admits, "I've never figured out how these cases got named." *Griswold* was known as the *Buxton* case in the Connecticut courts. "I don't know why it got changed to *Griswold* in the U.S. Supreme Court, but that's their business."