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ABORTION AND INFANTICIDE. By Michael Tooley.¹ Oxford: Clarendon Press. 1983. Pp. 441. \$29.95.

ABORTION AND THE POLITICS OF MOTHERHOOD. By Kristin Luker.² Berkeley: University of California Press. 1984. Pp. xvi, 324. \$14.95.

THE LAW GIVETH: LEGAL ASPECTS OF THE ABORTION CONTROVERSY. By Barbara Milbauer.³ New York: Atheneum. 1983. Pp. xiii, 363. \$21.95.

Robert H. King⁴

Over a decade has passed since *Roe v. Wade*, yet the abortion controversy has not subsided. In many respects, it has intensified. The moral issue is as unresolved as ever, while the political lines are even more sharply drawn. The controversy has so many ramifications—medical, legal, social, political, and philosophical—that it is difficult to get it clearly in view. We should not be surprised therefore that three recent books approach it in three quite different ways. Michael Tooley presents a closely reasoned philosophical argument dealing with the ethics of abortion, Barbara Milbauer attends primarily to the legal issues, and Kristin Luker examines the attitudes of participants in the political struggle.

I

Let us begin with Tooley's treatise, which is about the moral status of the unborn. The controversy, as he sees it, turns on whether or not the fetus is a person, for only persons can properly be said to have rights, including the right to life. That is because rights depend upon interests and only persons are subjects of non-momentary interests. The notion that membership in the human species is, in and of itself, sufficient to invest a being with the right

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to life, he considers to be ethically unsound; the fact that the terms "person" and "human" are often used interchangeably only compounds the problem. The concept of person, properly understood, connotes certain properties that not all members of the human species possess. These properties in turn provide the basis for a moral claim on behalf of the being that possesses them. While we may not agree as to precisely what these properties are (among the possibilities he considers are rationality, agency, self-consciousness, and simply the having of nonmomentary interests) there can be no question that the fetus does not yet possess them. But then could we not consider the fetus a "potential person" and recognize potential persons as having a right to life? He thinks not—arguing that we would not so regard animals who might acquire these properties by means of an as yet unknown drug. Moreover, by invoking what he calls the "moral symmetry principle," he attempts to show that an obligation to preserve the lives of potential persons would have as its corollary an obligation to produce more persons. Thus, the standard argument against abortion becomes also an argument against contraception, which in a time of overpopulation few people would agree to. But likewise—and this is where Tooley's argument will be shocking to most people—to accept personhood as the sole ground for acknowledging someone's right to life is to clear the way for infanticide as well as abortion, since at birth, and probably for several months thereafter, the child does not exhibit the defining marks of personhood. While we have not achieved sufficient clarity regarding the criteria of personhood or adequate data on the development of infants to say with certainty at precisely what point they acquire a right to life, he is confident that on the grounds he has laid out it would be no earlier than three months of age. Thus, as a strictly ethical matter, abortion and infanticide come under the same classification. According to this line of argument, we have no more *moral* reason to oppose one than to oppose the other.

II

When we turn to Milbauer's book, we enter a different world. For her the moral status of the unborn is not an issue. The debate is framed exclusively in terms of women's rights. How far are the courts prepared to go in securing for women, irrespective of their financial status, control over their reproductive processes? As the title of her book suggests, she feels that the courts have first bestowed a right and then proceeded to take it back. In developing

her position, she concentrates on the period between *Roe v. Wade* (1973) and *McRae v. Califano* (1980).

As she sees it, the Court in *Roe* concluded that "a woman had the right to choose to have an abortion and that her right to make that choice was founded upon her right to privacy, a fundamental right guaranteed by the Constitution." This decision produced a strong public reaction. Among the many attempts to mitigate its effect was the Hyde amendment to the Medicaid appropriations bill, first passed in 1976, which "restricted funds for abortions to only those women whose lives were in danger." The constitutionality of this legislation was tested in the courts several times before it was finally upheld by the Supreme Court in *McRae*. The effect of *McRae*, according to Milbauer, was to withhold from poor women a right previously granted to all women, since without the financial means to secure an abortion it is not a real option for them. Since *Roe v. Wade*, she maintains, "the Court has continuously whittled away at the woman's bodily autonomy, has consistently conditioned her right on the physician's approval, and has consigned the Ninth Amendment to a kind of legal purgatory."

Milbauer provides some interesting background material derived from interviews with "Jane Roe" and her attorneys, a useful explanation of certain legal terms likely to be unfamiliar to laymen, and, I would judge, a fairly comprehensive overview of the pertinent cases bearing on this issue. Yet it is certainly not a dispassionate commentary. What she has submitted is a brief on behalf of "abortion on demand." The overriding issue, as she sees it, is women's right to determine their own lives, a right that is closely tied to their right to choose an abortion. "Depriving a woman of this choice, the most intimate and personal one of all, dictates every other choice that will be open to her. To put that choice in another's hands is to deny her status as an equal, to deny her privacy, to deny her very humanity."

III

By comparison, Luker's book is a model of objectivity. In the preface she observes that a large proportion of the people who read it will already have made up their minds about abortion and will probably conclude that she has been "unduly generous with the opposition and unfairly critical of themselves." Perhaps so, but most readers should find it an illuminating interpretation of the social changes that have produced the current controversy and a sensitive portrayal of the participants. She has interviewed activists on both sides of the issue, and in the latter half of the book

she attempts to articulate the world views that support their respective positions. So while the book may not change any minds, it should help one to be more understanding of those who are personally and politically involved with the issue of abortion.

Luker takes the story back 150 years to the early nineteenth century, when abortion, at least in the early months of pregnancy, was not considered a serious moral issue. English common law prevailed in most states, and it took a generally permissive attitude toward abortion prior to the time of "quickening" (the moment when the woman first felt the movement of the fetus); only thereafter was it considered a criminal act. Around 1860, however, efforts were begun in many states to pass more restrictive legislation, and it was the medical profession that led the way. The new legislation made abortion, except to save the woman's life, tantamount to murder, reserving for the licensed physician the prerogative of deciding when the woman's life was endangered. The rationale for the change was that women had been ignorant of the developmental process by which the embryo assumed human form and did not realize the moral implications of terminating a pregnancy. Doctors, it was claimed, possessed the necessary knowledge and objectivity to determine when an abortion was justifiable.

Clearly this legislation vested physicians with a great deal of moral authority; but it also advanced the cause of their "professionalization." Regular physicians used the abortion issue to help drive out unlicensed competitors, who were largely responsible for the abortions being performed at that time. With this new legislation abortion was still possible, but only if performed by a licensed physician in whose judgment it was necessary to preserve the life of the woman. Women, meanwhile, were virtually excluded from the decision-making process.

For nearly a century abortion was treated as a medical rather than a moral issue. Practice varied widely, since it was left to the individual doctor to decide what constituted unacceptable risk to the woman. In the meantime medical technology had improved to the point where it was safer to have an abortion than to have a baby. Then, in the mid-50's, reformers began to seek liberalization of abortion laws, and in particular broader grounds for performing an abortion, including the emotional well-being of the woman and indications of fetal deformity. Interestingly enough, it was once again physicians who led the way in getting the law changed. While in practice they had wide discretion about whether and when to perform an abortion, they were aware that

the law could be interpreted much more strictly. By advocating more liberal legislation, they sought to bring the law into conformity with their behavior. Their advocacy, however, also had another effect: it brought the issue of abortion into the public domain.

IV

During the 1960's a number of states passed relatively liberal abortion laws. These laws continued to treat abortion as the taking of human life, but recognized more grounds for exception than the previous laws. The more activist women's groups, however, did not think the reforms went far enough. They were prepared to support illegal abortion clinics if the doctors insisted upon a strict interpretation of the new laws, but that proved to be unnecessary. There was apparently no lack of licensed physicians who would perform abortions as requested. Then came *Roe v. Wade* and even the most liberal state laws were struck down. Henceforth there could be no legal obstacle to abortion in the first trimester of a woman's pregnancy. It was a matter strictly between the woman and her doctor. While this decision had the effect of legitimizing prevailing practice in many states, it came as a shock to many people who had assumed that because abortion was immoral it was not practiced except under the most extreme conditions, such as an imminent threat to the mother's life. They did not realize that a major social change had preceded *Roe*.

Prior to 1973, a new political constituency had begun to form and a new claim began to be advanced. The new constituency was composed of women, largely working women. For them abortion was not simply a necessary evil to be undertaken reluctantly under conditions of exigency; it was a woman's right. The opportunity to choose whether and when to have children was, they felt, essential to women's aspirations to compete in the workplace with men. The Court's decision was a triumph for their point of view, but it also had the effect of arousing opposition from a different type of woman. If for some women abortion meant control over their lives and an opportunity to enter "male" vocations, for others it meant a devaluing of their primary role as mothers and a violent assault on the nascent life they were called upon to protect and nurture. The women who became political activists in opposition to *Roe* were homemakers rather than career women, moral absolutists rather than relativists, committed to the preservation of traditional values rather than the attainment of rights previously denied. Yet they were just as passionate in the

advocacy of their cause. For at stake was nothing less than their status as persons and their vocation as mothers. Devaluing the fetus meant devaluing them. Thus, for activists on both sides of the controversy, the abortion issue has come to be seen as more than just an interesting legal or philosophical question. In their eyes, says Luker, it is a virtual "*referendum on the place and meaning of motherhood.*"

V

At the end of her book, Luker discusses the prospects for success of the two groups: pro-choice and pro-life. She is frankly skeptical that either side can prevail because the viewpoint of most Americans on the subject of abortion is so profoundly ambiguous. Any attempt to secure unqualified acceptance for either position is almost certain to come up against conflicting values concerning the sanctity of life, the responsibilities of parenthood, and the limitations of freedom—to mention just a few of the possibilities. If the pro-life group, for instance, were to press its case to the point where the survival of the fetus was given equal weight with that of the mother, it would almost surely lose public support. Even before *Roe*, the general public, irrespective of religious tradition, did not consider abortion in defense of the mother's life to be wrong. Since then the consensus has broadened to include other legitimate grounds for abortion, such as rape, incest, and indications of fetal abnormality. Yet when pressed to say that abortion is a woman's right under all circumstances and that by virtue of the equal protection clause of the Constitution poor women are entitled to abortions at public expense, most people back off. We are apparently not prepared to support "abortion on demand."

It is unlikely, therefore, that either Tooley's or Milbauer's argument will prove convincing to readers who are not already persuaded of the rightness of their positions. Neither author proposes the kinds of distinctions and qualifications that are likely to gain and hold the middle ground. Tooley's standard of personhood as the sole basis for ascribing moral status to the fetus is simply too restrictive. It fails to take into account ordinary human sensibility. Some distinction along the continuum of fetal development is undoubtedly in order: the view that life begins at conception and hence our obligation to the three-month-old embryo is no different than to the three-year-old child is not likely to gain wide acceptance; yet to make actual personhood the crucial determinant, and thereby collapse the distinction between abortion and infanti-

cide, is sure to offend most people. It gives support to those who say that abortion is the first step toward systematic elimination of the aged and the infirm, the weak and the defenseless.

Milbauer, by contrast, presents herself as the champion of a certain class of defenseless individuals: indigent women seeking an abortion. She reasons that since the government has assumed responsibility for the medical care of the poor, it cannot in fairness withhold funding for this particular medical service merely because it is offensive to some people. In addition, she is critical of any attempt to restrict women's choice in this area, appealing to the right of privacy. Yet here again, some distinctions seem to be in order. We do not want to obligate a woman to sacrifice her life for the fetus, yet we may want to hold her more accountable for the outcome of sexual relations freely entered into than for those forced upon her against her will. In the minds of most people, the conditions of conception do make a difference—as do the stages of fetal development. Milbauer and Tooley, in the forceful advocacy of their positions, tend to obscure these distinctions.

Their presentation of the issues also fails to convey a "sense of the tragic," insofar as the loss of potential human life is concerned. Tooley considers the termination of a pregnancy the moral equivalent of a decision not to conceive, while Milbauer focuses almost exclusively on the plight of the woman who desires to control her own destiny. Even Luker, for all of her efforts to give a sympathetic portrayal of the viewpoint of activists on both sides of the abortion issue, sees it essentially as a woman's issue. She too fails to give expression to the deeply held conviction deriving from our religious heritage that human life at whatever stage of development is a sacred trust. We may in certain critical circumstances be obliged to sacrifice a life that has been entrusted to us in order to preserve a greater good, but it is none the less a *sacrifice*—the loss of something precious and irreplaceable. We have sometimes thought that it was just this sense of the intrinsic worth of human life—and the tragic loss sustained by its sacrifice—that was the distinguishing mark of our civilization.