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THE LAW GIVETH . . . LEGAL ASPECTS OF THE ABORTION CONTROVERSY. By *Barbara Milbauer* in collaboration with *Bert N. Obrentz*. New York: Atheneum. 1983. Pp. xiii, 363. \$21.95.

To the nonlawyer, Barbara Milbauer's¹ book *The Law Giveth* may be an original and valuable contribution to the debate over abortion because it focuses on the legal aspects of the controversy. To the lawyer, the book may be equally original and valuable because it goes beyond the legal aspects of abortion² to look at the development of the law on abortion, the happenstance nature of how legal rights are gained and lost, and most importantly, the lives of the women affected by abortion laws.

Milbauer begins her compendium of interviews, cases, historical material, and social analysis with an account of the woman called "Jane Roe," a Texan who agreed to let her case be the vehicle for challenging state prohibitions on abortion. Reading Justice Blackmun's opinion in *Roe v. Wade*³ affords an understanding of the legal response to the problem of unwanted pregnancy. Reading Jane Roe's story yields an understanding of the human side of the problem. Hardly anyone will be able to read dispassionately of how Jane, divorced and poor, lost custody of her only daughter through subterfuge to her mother, was raped by three men on a gravel road in Georgia, and returned to Texas to find she had no choice but to give birth to and give up a second child. Milbauer recounts interviews with other women as well, including Mary Doe, the plaintiff in *Doe v. Bolten*,⁴ the companion case to *Roe*, and the attorneys for these plaintiffs. She also gives short biographies of the major actors of the past — notably Margaret Sanger, who in the first half of this century almost single-handedly challenged the federal "obscenity" ban on birth control information and founded Planned Parenthood.

Milbauer also indulges the reader with historical material tending to show that anti-abortion laws and other restrictions on women's rights were more often than not products of the vagaries of

1. Milbauer is a 1980 graduate of New York Law School. She has authored several books including *DRUG ABUSE AND ADDICTION* (1970). Her collaborator, Bert N. Obrentz, is also a 1980 graduate of New York Law School and is associated with the International Ladies Garment Worker's Union.

2. The legal literature on abortion is abundant. For a sampling of discussions of the major issues, see Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721 (1981) (a criticism of the holding in *Harris v. McRae*, 448 U.S. 297 (1980)); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) (the seminal criticism of *Roe v. Wade*, 410 U.S. 113 (1973)); Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976) (defending the *Roe* result); Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979) (justifying the *Roe* result with an equal protection argument).

3. 410 U.S. 113 (1973).

4. 410 U.S. 179 (1973).

economics, politics, and chance. She notes that before the discovery of antiseptic surgery in the late 1860's and the widespread use of morphine as a painkiller starting in the Civil War, anti-abortion laws were for the most part encouraged by doctors concerned about the safety and health of women. After these two medical advances, other motivations became more prominent. It is surprising to learn, for instance, that anti-Catholic sentiment spurred some anti-abortion activity. Milbauer cites as an example a Harvard Medical School professor, Dr. Horatio Storer, who in 1869 wrote in alarm that while the largely Catholic immigrant population continued to procreate, the "Puritan stock" was threatened by a growing practice of abortion (p. 117).

The influential role of physicians in United States abortion law is a recurrent theme of the book. Indeed, Milbauer suggests that the decision in *Roe* gave the physician the most rights in the doctor-patient-state triangle. She notes that Margie Hames, who argued before the Supreme Court for the *Roe-Doe* case, had been advised that Justice Blackmun had been counsel to the Mayo Clinic. Ms. Hames was warned to down-play the idea of the right of a woman to control her own body and to emphasize the physician-patient relationship. Considering that Justice Blackmun eventually wrote the majority opinion, this tactical move may have had great significance.

In addition to interviews and background material, a large part of the book is devoted to case study. Milbauer quotes extensively from *Roe* and from important Supreme Court and lower court cases before and after *Roe* and offers explanation and criticism of the arguments and conclusions in the judicial opinions.⁵ She has taken each thread of the fiber of the later opinions and traced its origin — contraceptive rights, minors' rights, funding and entitlement, standards of review under the fourteenth amendment, and many more.

5. In an epilogue, the author discusses three cases that were argued before the Supreme Court on Nov. 30, 1982, but were not decided before the book went to press. The cases were decided on June 15, 1983, and sound a modest victory for abortion supporters. The lead case, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 51 U.S.L.W. 4761, 4767 (U.S. June 14, 1983), ruled unconstitutional various provisions of a city ordinance requiring, among other things, that abortions after the first trimester be performed only in hospitals and that physicians not perform abortions on unmarried women under fifteen without parental consent or a court order, regardless of the minor's maturity or emancipation. In the Epilogue, Milbauer writes, "whether Justice O'Connor . . . will vote with the conservative bloc on the abortion issue is a question whose [sic] answer is eagerly and anxiously awaited by everyone involved." P. 297. Indeed, Justice O'Connor wrote the dissenting opinion, in which she was joined by Justices White and Rehnquist.

Akron was limited somewhat in the other two cases. In *Planned Parenthood Assn. of Kansas City, Mo., Inc. v. Ashcroft*, 51 U.S.L.W. 4783 (U.S. June 14, 1983), a similar consent requirement was upheld because it was interpreted to mean that the juvenile court could not deny a minor's application for consent to an abortion "for good cause" unless the court first found the minor was not mature enough to decide for herself. In *Simopoulos v. Virginia*, 51 U.S.L.W. 4791 (U.S. June 14, 1983), the hospital requirement was upheld because, by the state's definition of licensed hospitals, it included outpatient clinics.

She directs her sharpest criticism at the post-*Roe* cases which held that federal (and hence state) funding for nontherapeutic⁶ or even medically indicated⁷ abortions was not protected by the decision in *Roe*. She concludes, "the right to privacy is unalterably tied to personal income" (p. 91).

Milbauer will be criticized by anti-abortion readers as not being objective enough. Indeed, her pro-choice bias is evident from the outset, and she announces in the Introduction that her purpose in writing the book is "of course, in part to have the reader agree" (p. 5). She does, however, quote from material unfavorable to her position; she also raises most of the arguments made by pro-life groups, and then, in lawyer-like fashion, systematically points out the defects in each one.

The tenor of the writing rests between legal scholarship and popular journalism. While she does not shirk from grappling with the most slippery concepts of constitutional law, the author defines legal terms to the point of paraphrasing "on its face" for the benefit of laypersons (p. 69). Many of the colloquial renderings of legal terms will be welcome even to the lawyer or law student. The holding in *Washington v. Davis*,⁸ that disproportionate impact is not a basis for strict scrutiny in race cases, comes out: "[i]t was the judicial equivalent in reverse of the road-to-hell-is-paved-with-good-intentions theory" (p. 106).

In the main, Milbauer documents her lengthy discussion adequately, and includes a respectable bibliography of books, articles, and cases in the appendix. In a few instances, she refers to "a recent survey" (p. 80) without more, or posits that "there is a valid purpose to keeping records of abortions" (p. 83), with no hint as to what that purpose is. And while her tone is generally passionate but controlled, Milbauer occasionally goes too far in arguing a point, as, for instance, in claiming that even if a rape victim did know who her attacker was, "it would most likely have been her own father . . ." (p. 31), and in warning that a future step in "encouraging normal childbirth" might be unannounced bedroom break-ins by law enforcement officers to determine if a couple's "positions and acts" were calculated to lead to reproduction (p. 197). Fortunately, these flights from reason are rare and the material in between is good enough to compensate for them.

Milbauer's stand on abortion is best represented by the following statement from her book:

To have an abortion, to keep the child, to put it up for adoption are

6. *Maier v. Roe*, 432 U.S. 464 (1977).

7. *Harris v. McRae*, 448 U.S. 297 (1980).

8. 426 U.S. 229 (1976).

hard, painful decisions that depend on individual situations. To rob a woman of her freedom to make that choice, awful though it may be, and to force upon her someone else's choice and its consequences is, however, calculated cruelty. [P. 180.]

The thesis of her book, however, is broader. It contemplates the fragility of individual rights in a lawmaking and law-interpreting system that is not, in fact, representative of the people whose rights are at stake, that is susceptible to undue influence by an Anthony Comstock or a Phyllis Schlafly, and that is so esoteric as to not be comprehensible to the majority. Implicitly, through accounts of those who fought against or through the legal system and effected protection of certain rights for women, for the poor, for any of those lacking in power in our society, Milbauer proposes that the fight, while far from certain, may not be hopeless. In any event, knowledge of the workings of the legal process is essential to the struggle, and that knowledge is precisely what she makes available.