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Abortion and the Politics of Motherhood

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BOOK REVIEWS

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

Reviewed by Susan H. Rockford*

Abortion and the Politics of Motherhood is devoted to a portrayal of the motivations underlying the current abortion debate as it ensues between pro-choice and pro-life activist women.[1] As refined and characterized by Luker, the issue of abortion in this context is really "a referendum on the place and meaning of motherhood"[2] and the participants are the women who perceive their lifestyles threatened in fact or in theory by the outcome of the debate.

According to Luker, pro-life and pro-choice women are recognizable and distinguishable by what she describes as their respective "world views," each being an "internally coherent and mutually shared view of the world that is tacit, never fully articulated, and, most importantly, completely at odds with the world view held by their opponents."[3] Briefly, the "world view" of a pro-life activist woman is articulated as morally straightforward and unambiguous, incorporating the belief that men and women are intrinsically different and have different roles to play. Central to this "world view" is a sort of faith and accept-

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1. The book is based on a study done by Luker. An activist is defined as an individual who spends ten hours or more a week in activity on the abortion issue if pro-life and five hours a week or more if pro-choice. As Luker, an associate professor of sociology at the University of California at San Diego, admits, this study is technically only a study of very deeply committed activists in the abortion debate in California; however, she extrapolates that it is probably a reasonably accurate picture of how abortion activists think and feel throughout the United States, as well as a picture of the background that made them feel the way they do.

2. K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 193 (1984).

3. *Id.* at 159.

ance of (or resignation to) an external natural order of things over which one does not exercise much control. An intrinsic part of this "natural order" is the role of motherhood.

Pro-choice activist women, on the other hand, are characterized as believing in the ability to control one's fate, at least to some degree, by making rational choices about life decisions, including both motherhood and careers. As Luker describes it, moral judgment for pro-choice women consists of "weighing a number of competing situations and rights and trying to reconcile them under general principles rather than specific moral rules."[4]

As an attorney and mother, born and raised in a Catholic, middle-class community in Queens, New York, I have had personal experience with both "world views." Thus, the emotional and psychological content of the abortion debate as described by Luker rings true. Like many women, I have the questionable privilege of being able to relate to both sides of the controversy; I wonder, however, how much of this dual identification is simply due to the fact that the external debate described by Luker reflects the internal ambiguity experienced by so many women, both pro-life and pro-choice, on this issue.

The most interesting aspect of this book is the depiction of the gut level on which the issue is felt by the women activists on both sides of the issue. Each party has, at least on some level, its survival at stake. It is each side's defense of its essence, its self-definition, that lends the debate its intense emotional quality; it is the politics of survival. While at times the positions expressed seem somewhat hyperbolic and even simplistic, which may be the logical result of this particular study sample, the moral complexity of the issue lies just below the surface.

For example, a pro-life woman is sure that an embryo at any state of development is a "person" but is not sure what she would do if impregnated by rape; a pro-choice woman believes that each woman should have freedom of choice but cannot condone abortion either as a deliberate method of birth control or in multiple cases of "negligence." Luker's book suggests that, regardless of the rhetoric, women on both sides of the debate know in their hearts that there is no absolute answer to this issue.

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4. *Id.* at 184.

A frightening prospect continued to haunt me throughout my reading of this book—that while this intra-gender warfare rages, those not involved in the emotional debate, *i.e.*, those who have no personal stake in the issue with regard to either status or sexuality, are able to use the issue strictly in the name of power. The abortion issue, as it is currently being used offensively in the political forum by those in positions of power, is unfortunately often merely an agenda item and its effects on the role of women in society will, therefore, be merely incidental.

Some of the historical observations made by Luker are interesting, but open to question. In essence, the book seems to attribute the vigor of the current pro-life and pro-choice movements to the "coming-out," as it were, of formerly private (or secret) attitudes and practices with regard to abortion. Two of the events described as central to this change were the Sherri Finkbine abortion case[5] and the decision of the United States Supreme Court in *Roe v. Wade*.[6]

According to Luker, prior to these events the abortion issue was debated and handled primarily by an elite professional group consisting of physicians who manipulated the issue for political and professional goals. At some point, other professionals joined the debate, but it continued to be handled "professionally." Once the issue "went public," however, via Finkbine and *Roe*, Luker hypothesizes that pro-life women realized that, in fact, abortion was more widespread and performed under a much more liberal standard than had been assumed (or, perhaps, not thought about at all). Indeed, *Roe* seemed to grant legal status to abortion on demand. Pro-choice women, on the other hand, realized how much power was being wielded by the medical establishment. These revelations and the resulting redefinition by pro-choice women of abortion as a women's rights issue, instead of as a professional or medical issue, sparked the

5. Briefly, in 1962 Sherri Finkbine discovered that the drug she had been taking to help her sleep during the early months of her pregnancy was Thalidomide, a drug which her husband picked up in Europe. On learning of the documented disastrous effects on fetuses of this drug, Finkbine sought an abortion. According to Luker, all went well until Finkbine, in the interests of alerting other women, reported her problem to the local newspaper before the abortion was performed. News of the planned abortion created a great stir and Finkbine was ultimately forced to have her abortion in Sweden. Luker, *supra* note 2, at 62-65.

6. 410 U.S. 113 (1973).

current debate among activists. Whether one agrees with this particular historical scenario or not, Luker's book is about the emergence of abortion as a human rights issue.

There is irony in Luker's observation that the decision of the United States Supreme Court in *Roe v. Wade* provided a spark for the current pro-life movement, indeed, shocked it into motion. *Roe v. Wade,* although it was heralded as a breakthrough in women's rights that gave women the "right" to an abortion, is outdated and on the brink of technological extinction. Even at the time of the decision, in 1973, it was a decision, which, apropos of Luker's historical framework, gave the abortion decision squarely to physicians. It placed the balance between women's rights and the state's interest in a fetus (for clearly, under the Court's analysis, states could take an interest in fetuses, even if they were not "persons") on a continuum measured by technological progress. As long as abortion was safer than childbirth, first trimester abortion was allowable unless, of course, the fetus was "viable." Viability was absolutely defined by technology: the potential ability to live outside the mother's womb, *albeit with artificial aid.*[7] And, even though set at three months at the time of the decision in 1973, viability was clearly intended to be a changing concept.

As must have been foreseen by the Court, as technology improves, abortion becomes safer and fetuses become viable earlier, until, as Justice Sandra Day O'Connor recently observed,[8] the issue becomes a standoff, with the woman and the fetus squared off, having, under the *Roe* analysis, equal legal status.[9] Analytically, rather than symbolically, *Roe* is not necessarily a strong women's rights decision and is currently so vulnerable that it has perhaps become a liability to the pro-choice movement.[10]

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7. 410 U.S. at 160. While the articulation of the viability standard has changed somewhat in subsequent cases, the underlying technological concept seems to be the same.

8. City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481 (1983).

9. Commentators have explored this problem. *See, e.g.,* King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn,* 77 MICH. L. REV. 1647 (1979); Note, *Current Technology Affecting Supreme Court Abortion Jurisprudence,* 27 N.Y.L. SCH. L. REV. 1221 (1982).

10. *Roe* has been the subject of much analysis and criticism of its underlying jurisprudence. *See, e.g.,* Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade,* 82

Luker's projections for the future of the abortion controversy are sad indeed. She tentatively suggests that the abortion issue will run cyclically and, at least for a time, may become like Prohibition: nominally illegal, but available for those with the right money and right information. I hope she is wrong, but fear she may be right. Resolving abortion as a Prohibition-like, purely political issue is simply a return to the worst aspects of the 1950's and speaks ill of a society that is truly interested in having its morality taken seriously.

YALE L.J. 920 (1973); Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).

HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES. 2 Vols. Edited by Theodor Meron. Oxford: Clarendon Press, 1984. Pp. 566. $79.90.

Reviewed by Daniel C. Turack*

With very little reflection, academics can think of many cogent reasons for teaching a course on international human rights, yet the subject has not entered the mainstream of university education. One reason for the subject's absence from the standard university curriculum has been the paucity of teaching materials and teaching tools such as casebooks and textbooks. Of late, these shortcomings have been remedied[1] and Professor Meron has admirably added to the sources available.

This book is comprised of thirteen chapters, each contributed by a different international lawyer specializing in the human rights field; it is organized into three distinct parts: "The Setting" (I), "Global Protection of Human Rights" (II), and "Regional Protection of Human Rights" (III). With the exception of the first chapter, which is more than an overview on the teaching of human rights, the format for each of the succeeding chapters shows the legal and policy considerations of the particular topic that forms the core of the book, teaching suggestions, a brief syllabus, a mini-syllabus, a bibliography and a mini-bibliography. Easily, the best review of the book's contents is to reproduce Professor Meron's introductory chapter. Aside from his summary, comments on each author's contribution, and purposes behind the book, the editor makes us aware of the status of human rights, the conflicts that exist with implementation and political realities, and possible pedagogical tactics that can

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1. The teaching of human rights has received an enormous boost from the availability of the following: R. LILLICH & F. NEWMAN, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY (1979); M. MCDOUGAL, H. LASSWELL & L. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980); L. HENKIN, THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS (1981); K. VASAK, THE INTERNATIONAL DIMENSION OF HUMAN RIGHTS (P. Alston ed. 1982); A. ROBERTSON, HUMAN RIGHTS IN THE WORLD: AN INTRODUCTION TO THE STUDY OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS (2d ed. 1982); T. FRANCK, HUMAN RIGHTS IN THIRD WORLD PERSPECTIVE (1982); P. SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS (1983).

be employed in teaching the subject. He makes us aware that this work does not embody the entire corpus juris of international human rights.

The second chapter, by Professor Louis Henkin, provides a comparative philosophical study of American constitutional and other rights with those in the international system. It is not a structured comparative study in fine detail. Rather, it compares United States and international human rights in spirit and jurisprudential perspective. He believes that to understand the international law of human rights, one must comprehend their relation to rights in a national system. Consequently, Henkin traces different notions of the concepts of rights and their place in United States national political theory, as well as the role of judicial review. Based upon the method adopted in this study, it is suggested that one might teach national and international human rights as comparative constitutional law.

The third and concluding chapter of this part, by Jerome J. Shestack, offers a theoretical framework for human rights. He examines the philosophical underpinnings of these rights and looks into the norm-making process creating them. He provides insight into the nature of human rights, their sources, and various approaches to the subject. In sum, his purpose is to introduce human rights and alert the reader to some of the principal issues in the area, with the hope of encouraging further intellectual exploration. His teaching suggestion is to raise philosophic issues throughout the course.

Part II, "Global Protection of Human Rights," commences with Professor Richard B. Lillich's investigation of civil rights following the pattern of articles 3-18 of the Universal Declaration of Human Rights, and its companion counterparts in the International Covenant on Civil and Political Rights. He does not create a comprehensive map of all civil rights, but rather emphasizes those rights which cannot be derogated under the Covenant. His approach is analytical rather than historical, and he stresses process over substance in his teaching suggestions. In chapter five, Professor John P. Humphrey stresses in historical context the development of political rights first enunciated in articles 18-21 of the Universal Declaration and their counterparts in The International Covenant on Civil and Political Rights. These are the freedoms of thought, conscience and reli-

gion, of peaceful assembly and association, of participation in the government of one's country, of equal access to public service, and the right of all peoples to self-determination. He looks at two approaches to teaching the subject: the "historical-structural" (dynamic) method and the "analytical-exegetical" (static) method, and outlines the pros and cons of each approach.

Professor David M. Trubek writes on the meaning, nature and protection of economic, social and cultural rights, which he treats collectively as "social welfare rights," in a Third World context. He delves into the effect of political and social vitality in shaping law, and the role of law in shaping political and social circumstances. His focus is also on the behavior of United Nations Specialized Agencies in the overall implementation system of these rights. He considers a process-oriented approach most beneficial in teaching the subject.

Francis Wolf, Legal Adviser in the International Labour Organization, (I.L.O.), uses his expertise with the activities of that body to analyze the functioning of national and international machinery for supervising the application of I.L.O. conventions. He concentrates on the various I.L.O. contentious and noncontentious procedures for investigating alleged violations and complaints.

Jack Greenberg brings the perspective of an American civil rights practitioner to the topic of "Race, Sex and Religious Discrimination in International Law," in chapter eight. His exposition highlights international instruments dealing with affirmative action, and provides an interesting insight as to how certain United States cases could have been resolved under relevant international instruments, rather than under statutes or the United States Constitution. He advocates the use of the case method as a means of teaching the subject. In a short ninth chapter, Professor Yoram Dinstein conveys the essence of human rights in armed conflict. Moreover, he outlines the interplay of human rights during peacetime and wartime, as well as the problems of enforceability and supervision. With respect to teaching this aspect of the subject, he finds it preferable to incorporate specific problems into the course relating to actual armed conflicts occurring at the time of teaching.

Professor Louis B. Sohn presents a survey of the progress and mechanisms for implementation and supervision of human

rights in the United Nations context. Some developments are still in inchoate form, such as resort to the good offices of the Secretary-General, fact-finding groups and use of independent experts. He is optimistic about the many constructive steps that the United Nations has at its disposal to promote and protect human rights. The contribution of various non-governmental organizations to the human rights cause is the subject of Professor David Weissbrodt's twelfth chapter. He describes the work techniques of non-governmental organizations and encourages students to become involved in their activities. Teaching suggestions include problems suitable for class discussion and role-playing.

Part III contains the final two chapters on regional protection of human rights. The two distinct legal sources comprising the inter-American system are discussed by Judge Thomas Buergenthal. He describes the manner in which the regimes under the American Convention on Human Rights and the Charter of the Organization of American States evolved, their practice, and how they interact. The role of country studies, on-site inspections and individual communications is emphasized. Judge Buergenthal suggests that it would be best to teach students about this regional system by discussing and comparing it with the European system.

Professor Rosalyn Higgins contributes the final chapter, which deals with the system developed under the European Convention on Human Rights. She begins with a brief discussion of the conceptual issues, to show where human rights jurisprudence is rooted, then moves into the Convention's implementation machinery and its operation. The final component for understanding the European Convention in action is seen in her detailed discussion of case studies on some specific rights, such as freedom from torture. She believes that the case method could be best used to teach the subject.

While the legal and political considerations do not purport to offer an exhaustive analysis of any of the topics, they do reflect an extensive and diverse range of legal, political, and social issues. The teaching suggestions offer a broad spectrum of approaches. The substantive scope of each chapter is not mutually exclusive with the rest. Authors make cross-references and allude to the considerations of other authors in this work. Profes-

sor Lillich, for example, in his discussion of Civil Rights under the International Covenant, consistently refers to the American and European Conventions. Mini-syllabi and mini-reading lists are included along with their expanded counterparts for teachers who cannot devote an entire course or seminar to human rights in general or to a given area. The mini-bibliography is not always a shorter version of references contained in the bibliography, as shown in Professor Humphrey's chapter.

The structure, content and diversity of teaching suggestions demonstrates that the book is particularly well-suited for teaching human rights to students at least on the graduate and law school levels. It could be used, with more introductory materials, at the undergraduate level. Professor Meron and his co-authors have gone the extra distance to help in the cross-fertilization between law and the other social sciences.

THE LAW OF CHILD CUSTODY: DEVELOPMENT OF THE SUBSTANTIVE LAW. By Shirley Wohl Kram & Neil A. Frank. Lexington: Lexington Books, 1982. Pp. xvi, 176. $21.00.

Reviewed by the Honorable Rose McBrien*

The practice of domestic relations law is both difficult and painful—difficult in that the body of law is complex and unpredictable, and painful in that the client is emotionally involved and does not understand the difficulties. The area of child custody is perhaps the most frustrating to the practitioner and to the client alike.

How does the practitioner explain the obscurities of the child custody law to a parent intent on getting his or her children at any cost? "It is undisputed that 'the best interest of the children' must govern in the adjudication of custody" in the State of New York.[1] The law also tells us that in all cases there shall be no prima facie right to the custody of the child in either parent.[2] "The only absolute in the law governing custody of children is that there are no absolutes."[3] Considering this body of law, it can be argued that such guidance appears to be no guidance at all. Each party believes that the custodial relationship in the best interests of the child would include that party as the custodial parent. This is usually the basis of the custody battle. In order to counsel a litigant and prepare for trial, an attorney must explore the myriad factors which a court may consider and the weight that will be given each one. This book, with its detailed historical overview of child custody, is a valuable aid to attorneys in custody litigation.

The authors of this thoughtfully presented dissertation aim to present a "comprehensive analysis of the conceptual evolution of judicial and legislative policy toward the resolution of disputed child-custody proceedings."[4] The value of this work is in

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1. Nehra v. Uhlar, 43 N.Y.2d 242, 246, 372 N.E.2d 4, 5, 401 N.Y.S.2d 168, 169 (1977).
2. N.Y. DOM. REL. LAW section 240 (McKinney 1983).
3. Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 93, 432 N.E.2d 765, 767, 447 N.Y.S.2d 893, 895 (1982).
4. S. KRAM & N. FRANK, THE LAW OF CHILD CUSTODY: DEVELOPMENT OF THE SUBSTANTIVE LAW at xiv (1982).

its treatment of historical development in setting the tone for current judicial thought in child-custody disputes. Through historical perspective certain predictabilities can be derived. The authors use the law of New York State to demonstrate the development of the law of child custody; other jurisdictions are compared and contrasted in order that valid conclusions may be drawn on a broad national scale.

This volume is directed to the substantive law in terms of the relief that a court of law may award. A future volume will be devoted to procedural and ancillary topics in this area of the law. The work thus far completed covers three major categories of substantive relief: "(1) custody, or choosing which contestant will have the ultimate control and/or physical possession of the minor child; (2) visitation, or the extent to which an adversary party will obtain the company and limited control of a minor child for a specified time; and (3) counsel fees, which concerns the liability of the parties to the potentially crippling expense of litigating the first two enumerated issues."[5]

The authors begin with a brief discussion of subject matter jurisdiction, averring that the substantive issues cannot be studied in a vacuum. Only the procedural knowledge necessary to gain access to the courts is presented.

The authors then delve into the historical basis for the law of child custody, beginning with the common law preference for custody in the father. In an 1837 decision, *People ex rel. Nickerson,*[6] the New York Supreme Court found a prima facie right in the father to the custody of a child, citing an impressive list of old English decisions as authority. It was felt that "the interference of the court with the relation of father and child, by withdrawing the latter from the natural affection, kindness and obligations of the former, is a delicate and strong measure; and the power should never be exerted except for the most sound and solid reasons."[7]

The Tender Years Doctrine, the rule of law that enshrined the mother as the preferred parent in most custody disputes, developed slowly, originally as exceptions to the common law right

5. *Id.* at xv.
6. 19 Wend. 16 (1837).
7. *Id.* at 19.

of custody in the father. During the late 1800's, although the father's prima facie right to custody was still intact, courts became increasingly more liberal in finding reasons for awarding custody to the mother. In the 1904 decision of *People ex. rel. Sinclair v. Sinclair*,[8] the court found that the "tender years" of the children was reason enough to award custody to the mother.

The presumption in favor of the father eventually gave way under the Tender Years Doctrine, which came to full maturity in the case of *Ullman v. Ullman*.[9] The court held that "[t]he child at tender age is entitled to have such care, love and discipline as only a good and devoted mother can usually give."[10] Up to this point the father had enjoyed a natural right to his children unless the mother could persuade the court otherwise. With this decision, the burden was reversed.

The succeeding sixty years, the authors tell us, found the law presuming that the mother was better suited to care for young children. The major exception to the rule was in cases of flagrant adultery.

Only recently has the law recognized the demise of the presumptions that gave credence to the Tender Years Doctrine. Women are no longer expected to stay home with their children. It is often incumbent upon the wife to enter the work force in order to better provide for the family. Likewise, it is widely recognized that a father may assume much of the responsibility in the care and upbringing of his children. The days when a father remained aloof with regard to such matters are gladly over.

Although there is no longer a prima facie right of custody in either parent, old prejudices die slowly. The painstaking history of the Tender Years Doctrine provided by the authors demonstrates to those new to the child custody field how far the rights of fathers have had to come. The slowness with which the law has evolved suggests that fathers still have some distance to travel before prejudice and misapprehension about their role disappears. Actual parity between fathers and mothers with respect to their right to custody may not occur for some time.

What does this historical perspective mean to the practi-

8. 91 A.D. 322, 86 N.Y.S. 539 (N.Y. App. Div. 1904).
9. 151 A.D. 419, 135 N.Y.S. 1080. (N.Y. App. Div. 1912).
10. *Id.* at 424-25, 135 N.Y.S. at 1083.

tioner counseling a client in a child-custody dispute? It seems incumbent on the father that he show he is capable of caring for and raising the children. In this enlightened age, as previously mentioned, it is no longer unusual for the father to take an active role in these endeavors. Most courts would assume the mother fit unless it is otherwise demonstrated. The threshold question is whether both parents can adequately care for the children. If both are fit, the court must explore other issues, including finances, living arrangements, environment and psychological aspects. Therefore, the first order of business for the father is to prove himself capable of child care, thus clearing the Tender Years Doctrine hurdle. Then he must establish his superiority in terms of other considerations. For her part, the mother must show her superior ability to care for the children, or the father's lack thereof. Then she must turn her attention to the other factors.

The authors next consider the current standards for the determination of custodial disputes. Recognizing that all cases involve degrees of fitness, rather than declaring a parent fit or unfit, a broad spectrum of factors are discussed. Also of interest is the treatment afforded the effect of illegitimacy on custodial disputes, the rights of third parties as against the natural parents, and visitation.

Counsel fees, a subject of noteworthy importance in such disputes, is dealt with thoughtfully and thoroughly at the conclusion of this work.

The authors have written an excellent study of the law of child custody. The insight provided through historical perspective should be helpful to any practitioner immersed in this difficult and painful area of the law.