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REVIEW

How Not To Promote Serious Deliberation About Abortion

Michael W. McConnell[†]

Abortion: The Clash of Absolutes. Laurence H. Tribe. W.W. Norton & Co., 1990. Pp xvi, 270.

I.

Professor Laurence Tribe, a long-time advocate of abortion rights, set out in this book¹ to “challenge[] the inevitability of permanent conflict” over the abortion question and to “discover areas in which the two sides can find common ground” (p 7). His goal would not be “to ‘prove’ to anyone the correctness of any particular position in the abortion debate” (p 8), but to expose each side to “the strengths of the other’s arguments and the weaknesses of its own” (p 8). For those whose minds are not made up, the book would be “an invitation to grapple” with the problem, and for others, it would at least “offer[] a window into the way the ‘other side’ sees things” (p 9). Tribe called the book *Abortion: The Clash of Absolutes* to call immediate attention to his theme that we, as a nation, must “move beyond the clash of absolutes” (p 6).

This is a worthy purpose. There is too much shouting and too little serious discussion of the law and morality of abortion. And Professor Tribe is an ideal person to pursue the dialogue. With his long-term commitment to abortion rights and his unequalled stature as a scholar in constitutional law, Tribe is in a unique position

[†] Professor of Law, The University of Chicago. The author thanks Albert Alschuler, Eleanor Alter, Akhil Amar, Mary Becker, Gerard Bradley, Anne-Marie Burley, David Currie, Marcella David, Frank Easterbrook, Clarke Forsythe, Alan Freeman, Melodie Gage, Mary Ann Glendon, Abner Greene, Stephen Holmes, Larry Kramer, Douglas Laycock, Mary McConnell, Elizabeth Mensch, Richard Posner, David Smolin, Geoffrey Stone, Cass Sunstein, and Diane Wood for their helpful comments on an earlier draft.

¹ Laurence H. Tribe, *Abortion: The Clash of Absolutes* (Norton, 1990). All parenthetical page numbers in the text and footnotes refer to this book.

to speak the hitherto unspeakable—to introduce his audience to the pro-life position, to show that the pro-life position is not (as he says many pro-choice advocates assume) “prejudiced, superstitious, [and] backward” (p 239). Committed proponents of abortion rights may not listen to pro-life philosophers like John Finnis or John Noonan; certainly they will not listen to activists carrying placards that say “Abortion is Murder.” But they might listen to Professor Tribe. And they would learn that there is a substantial basis in ethics, science, and law for the proposition that the state should extend its protection to many of the beings now stripped of legal protection under *Roe v Wade*.² They might then be more willing to move in the direction of moderate, humane reform of the law of abortion. They might be more inclined to dissociate themselves from the extremists who believe that any step in the direction of protection for unborn life is a move toward the enslavement of women.

By the same token, if pro-life advocates heard Professor Laurence Tribe, of all people, taking their ethical, scientific, and legal claims seriously, they might also be inclined to listen with a more sympathetic ear to Tribe’s description of the other side of the tragedy of abortion. Because abortion opponents tend to view children as a blessing, they are sometimes less than empathetic toward the genuine desperation and hardship of women who are not in a position to see the onset of pregnancy or the arrival of a child that way. Pro-lifers are not likely to listen to philosophers like Judith Jarvis Thomson³ and they certainly will not listen to activists like Molly Yard. But if a respected pro-choice scholar like Professor Tribe took the trouble to present the pro-life position fairly, and was willing to address their arguments on the merits, they might well be receptive to hearing his presentation of the “other side” of the issue. And Tribe has much to say about the ethical and logical pitfalls of an uncompromising pro-life position, which could make opponents of abortion more willing to move in the direction of moderate, humane reform of the law of abortion.

Professor Tribe could have written a great and important book.

Unfortunately, it turns out that Professor Tribe is too little informed about the ethical, scientific, and legal arguments of opponents of abortion to be able to explain them, too unacquainted

² 410 US 113 (1973).

³ See Judith Jarvis Thomson, *A Defense of Abortion*, 1 Phil & Pub Affairs 47 (1971) (summarized at pp 129-30).

with pro-life people to understand their motivations or address their concerns, too committed to his own perspective to see things through the eyes of the other side, and too much a lawyer to put aside, even for a moment, the opportunity to argue his case. Tribe proclaims the need to move beyond the clash of absolutes, but his only proposals are that one side's absolutes should be adopted and the other side's rejected.

The footnotes at the back of the book and the acknowledgments at the front say it all. Tribe cites over thirty scholarly books and articles, and three amicus briefs, by proponents of abortion.⁴ He cites no anti-abortion briefs and only four anti-abortion scholarly works. Even that number exaggerates the book's coverage of pro-life arguments. One source, John Noonan, is cited only for historical facts regarding the Catholic Church's position on abortion (pp 31-32 nn 18-20); Noonan's powerful writings on the merits of the question are ignored. A second, Robert Bork, is quoted for his *conclusion* that *Roe* was legally unsupportable (p 82) (only to be refuted by Tribe in the ensuing sixteen pages), but Bork's *reasons* are not given. The third citation is to what Tribe calls an "irreverent aside" written by John Hart Ely (p 114), which Tribe also promptly refutes (p 114-15). Tribe does not grapple with the remainder of Ely's famous article in which Ely contends that *Roe* "is not constitutional law and gives almost no sense of an obligation to

⁴ Tribe relies heavily on these amicus curiae briefs, but not to acquaint his readers with the arguments of partisans. He treats the briefs as if they were scholarly authorities (see p 244 n 1 (stating that an amicus curiae brief is "the point of departure for much of this chapter [on the history of abortion law]")). This is a questionable scholarly practice. Briefs are a form of advocacy, not of objective analysis. For example, Professor Tribe is apparently unaware that another scholar has charged that the historians' brief on which he relied misrepresented one of its principal sources, James C. Mohr's *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (Oxford, 1978). Mohr was, in fact, one of the signatories on the brief, but Gerard Bradley reports that, when contacted by telephone about the discrepancies between his scholarly work and the brief, Mohr "conceded that some of what the brief said and implied about the common law and the purpose of the nineteenth-century statutes was inconsistent with what he had maintained in his book." Mohr attributed this inconsistency to the differences in roles between "citizen" and "scholar" and "added that where inconsistencies exist he stood by the book rather than the brief." Gerard V. Bradley, *Academic Integrity Betrayed*, First Things 10, 11 (Aug-Sept 1990).

Tribe also fails to inform his readers that even Mohr's scholarly work is contested within the historical profession and failed to cite historical works containing an alternative interpretation. See, for example, John Keown, *Abortion, Doctors and the Law* (Cambridge, 1988); James S. Witherspoon, *Reexamining Roe: Nineteenth Century Abortion Statutes and the Fourteenth Amendment*, 17 St Mary's L J 29 (1985); Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U Pitt L Rev 359 (1979). This is not to say the contrary account is right and Mohr wrong. But a book designed to expose each side to the position of the other might have informed its readers of the debate.

try to be.”⁵ (It also bears mention that Ely’s argument is anti-*Roe* but *not* pro-life; Ely is avowedly pro-choice.) Only the book *Abortion and Divorce in Western Law*,⁶ by Tribe’s Harvard colleague Mary Ann Glendon, receives extended treatment. And she offers a comparison of American abortion law to the more moderate, less rights-centered abortion laws of western Europe; she does not focus on the ethical, scientific, and legal arguments that are at the heart of the pro-life position. The footnotes thus reveal that Tribe made almost no attempt to acquaint himself with the pro-life position as it has been articulated by anti-abortion ethicists, scientists, historians, and constitutional lawyers.⁷

In the acknowledgments, Tribe expresses thanks to a number of individuals who read the work in draft form and made comments and suggestions. This is an important part of scholarly endeavor, because critical comments by colleagues are one of the best ways to discover the weaknesses and gaps in one’s argument. When writing a book designed to discover “common ground” between contending positions, it would be especially helpful to consult individuals who take a position contrary to the author’s. Apparently, Professor Tribe had no such person to call upon. Putting aside the students and editors whose names are mostly unknown to me,

⁵ John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L J 920, 947 (1973) (emphasis in original).

⁶ Mary Ann Glendon, *Abortion and Divorce in Western Law* (Harvard, 1987).

⁷ In my opinion, the best work on abortion from a pro-life point of view is James Tunstead Burtchell, *Rachel Weeping and Other Essays on Abortion* (Andrews and McMeel, 1982). Other excellent works include Germain Grisez, *Abortion: the Myths, the Realities, and the Arguments* (Corpus, 1970); Rosalind Hursthouse, *Beginning Lives* (Basil Blackwell, 1987); John T. Noonan, Jr., *A Private Choice* (Free Press, 1979). Especially noteworthy is the feminist pro-life literature, such as Sidney Callahan, *Abortion & the Sexual Agenda*, Commonweal 232 (Apr 25, 1986); Lisa Sowle Cahill, *Abortion, Autonomy, and Community*, in Patricia Beattie Jung and Thomas A. Shannon, eds, *Abortion and Catholicism: The American Debate* 85 (Crossroad, 1988); Elizabeth Fox-Genovese, *Feminism Without Illusions* 81-86 (North Carolina, 1991).

Examples of writings exploring the positions on both sides include Sidney Callahan and Daniel Callahan, eds, *Abortion: Understanding Differences* (Plenum Press, 1984); Celeste Michelle Condit, *Decoding Abortion Rhetoric: Communicating Social Change* (Illinois, 1989); Elizabeth Mensch and Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 Georgia L Rev — (forthcoming 1991). Examples of writings supporting abortion rights while treating the moral problems of abortion with commendable seriousness include Daniel Callahan, *Abortion: Law, Choice and Morality* (Macmillan, 1970); Kathleen McDonnell, *Not An Easy Choice* (Women’s Press, 1984); Ruth Colker, *Feminism, Theology, and Abortion: Toward Love, Compassion, and Wisdom*, 77 Cal L Rev 1011 (1989); Daniel Callahan, *An Ethical Challenge to Prochoice Advocates*, Commonweal 681 (Nov 23, 1990); James M. Gustafson, *A Protestant Ethical Approach*, in John T. Noonan, Jr., ed, *The Morality of Abortion* 101 (Harvard, 1970).

None of these works is cited in *Abortion: The Clash of Absolutes*.

Tribe thanks four scholars in the field. All of them are at least as committed to abortion rights as Tribe is himself.

If the footnotes are an indication of Tribe's reading list and the acknowledgments are an indication of Tribe's conversation partners, it is no wonder that he was unable to write a book dealing fairly with the issue of abortion. The wonder is that a person with so limited an exposure to the other side would have felt equipped to attempt a book with the stated purpose of providing a "window into the way the 'other side' sees things."

After the call to mutual understanding in the first chapter, there is no pretense (or perhaps I should say only the pretense) of evenhandedness in the rest of the book until the last chapter, when the theme of mutual respect unexpectedly reappears. Arguments in favor of the abortion right are spelled out in uncritical detail with scant effort to anticipate objections or respond to them. Arguments against are presented in caricature, only to be refuted. The "common ground" hinted at in the introductory chapter turns out to be nonexistent—because Tribe cannot bring himself to support a single limitation on the woman's right to choose, no matter how moderate. Forty-eight-hour waiting periods? Prohibition of sex-selective abortions? Limits on the range of acceptable reasons? Parental notification? Prohibition of late-term abortions? All, according to Tribe, are "cruel compromises" that "are not compromises at all" (p 208). By contrast, "it must not be forgotten that *Roe* itself represented a compromise" (p 78). That does not leave much room to maneuver.

II.

In his constitutional analysis, Professor Tribe attempts to avoid the logical conundrum, so devastating to the *Roe* opinion, that to withdraw protection from fetal life appears to resolve the question of when life begins, the very question the Court thought inherently unanswerable. Thus, Tribe sets as his goal to show that "[e]ven if the fetus is a person, our Constitution forbids compelling a woman to carry it for nine months and become a mother" (p 135). The basis for the argument is that abortion laws do not "merely" ask the pregnant woman "to refrain from killing another person," but also require her to "make an affirmative sacrifice, and a profound one at that, in order to save that person" (p 130). Tribe is right to make this distinction. In our legal culture, granting a private right to kill would be incomprehensible, but recognizing a private right *not* to be forced to provide care and sustenance for another person has deep roots in our libertarian tradition. Tribe

expressly links his pro-choice position to the libertarian philosophy of Robert Nozick (p 131).⁸

The oddity is to find Professor Tribe in the camp of the libertarians. On most public policy issues Tribe is an advocate of greater use of governmental force to require citizens who are better off to assist the less powerful and fortunate. The philosophic ideal behind modern American liberalism is not libertarian, but egalitarian. One expects to find Tribe citing Rawls, not Nozick. And if Rawls is correct that the strong have a justly enforceable affirmative obligation to the weak, up to the point where further inequality would promote the interest of the weak, it would be difficult to defend abortion rights except perhaps in the rare "hard cases." Why do liberal pro-choice advocates suddenly find Nozick's libertarianism so convincing when the question turns to abortion?

Tribe notes that the duty of care imposed on the pregnant woman by a ban on abortion is uniquely intrusive and burdensome. This may be true (though other legal obligations, like the obligation of the parents to care for an infant, the obligation of a juror to sit for a trial lasting many months, and the obligation to fight and perhaps die in war come close), at least in the case of normal pregnancies, which account for most abortions. But he seems to forget that under his premise, the fetus is a person, too; and for the law to allow the abortion imposes a unique burden and deprivation on the fetus. Nowhere else in the law do we subordinate the life of one person to the freedom of the other.

⁸ A rigorous analysis of abortion rights under libertarian principles, however, would require consideration of two difficult problems. First, certain status relationships, such as parent-child, are thought (even by most libertarians) to entail special duties of care. On Tribe's heuristic premise that a fetus is a person, one cannot distinguish the parent's duties to the child in the womb from those due the child thereafter. In this connection, it is striking that Tribe's summary of duties to others under Anglo-American law devotes three pages to the relationships of strangers (pp 130-33) and only a paragraph to the closer analogy, the duties of parents to children (p 133). Second, even if we assume that the parent has no affirmative duties to the unborn child, we might well classify induced abortion as an act of violence rather than as a mere refusal of care. Just because one person has no affirmative obligation to another does not mean that he has a right to kill. Judith Jarvis Thomson's hypothetical prisoner may have the right to unplug herself from the famous violinist, as Tribe insists (p 131), but would she have the right to stab him to death in his sleep if necessary to extricate herself? Largely due to these complications, libertarians are divided on the issue of abortion rights. Compare Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 S Ct Rev 159; Ron Paul, *The Pro-Life Case for the "Abortion Pill,"* 4 Liberty 29 (1990) (both defending restrictions on abortion from a libertarian perspective), with Tibor R. Machan, *Fetal Rights and Women's Rights*, 2 Liberty 51 (1989); Eric Schendel, *Abortion and Feticide*, 4 Liberty 43 (1990) (both opposing restrictions on abortion from a libertarian perspective).

My point here is not to make the anti-abortion argument that life must take precedence over lesser rights. It is simply to point out that neither Tribe's selective libertarianism nor his emphasis on the uniqueness of pregnancy and abortion proves his point. Pregnancy is a unique situation, and *both* possible resolutions to an unwanted pregnancy ask one party or the other—the woman or the fetus—to make a sacrifice that the law asks of no one else. The fact of uniqueness does not tell us which should yield. No matter how much Tribe would like to evade the question, I think it is impossible to resolve this question without deciding what respect must be accorded to unborn life.

Tribe claims that a "further reason" to treat abortion rights as constitutionally protected is that, since a ban on abortion burdens "only . . . women," it is a form of sex discrimination, violating the Equal Protection Clause "unless it is needed to serve the most compelling public interest" (p 105). But the "compelling interest" standard is designed for cases in which the dominant majority advances its interests at the expense of the minority. In the case of abortion, while it is true that women bear the larger part of the burden, it is also true that men frequently consider themselves burdened by the responsibilities of unintended parenthood. There is no reason (and no precedent) for imposing an unusually high constitutional standard on a law burdening both women *and* men, albeit unequally, in the interest of a group (the unborn) who certainly do *not* exercise inordinate power in the legislature.

Moreover, as a matter of basic constitutional doctrine, a law does not violate the Equal Protection Clause merely because it burdens one race or sex more heavily than another. Such a law is subject to heightened judicial scrutiny only if the legislature had an intent to discriminate.⁹ There exists no substantial evidence that abortion laws, as a matter of historical fact, were motivated by such an intent to discriminate against women. Indeed, the history of abortion laws shows that they were principally a response by the medical profession to improvements in the technology of abortion and to newly-discovered information about embryology.¹⁰ As Tribe

⁹ *Washington v Davis*, 426 US 229 (1976); *Personnel Administrator of Massachusetts v Feeney*, 442 US 256 (1979). To be sure, Tribe is a critic of these decisions, see Laurence H. Tribe, *American Constitutional Law* 1512-13 (West, 2d ed 1988), but if that opposition is the basis of his argument here, he does not so inform his readers.

¹⁰ See Carl N. Degler, *At Odds: Women and the Family in America from the Revolution to the Present* 240-41 (Oxford, 1980); Dellapenna, 40 U Pitt L Rev at 402-05 (cited in note 4). The mammalian ovum was first discovered in 1827, and the modern theory of conception became accepted in scientific circles early in the nineteenth century. *Id* at 404. Only then did the idea that life begins at conception gain scientific warrant.

concedes, the "force behind [the enactment of anti-abortion laws] was neither religious belief nor a popular moral crusade," but the "ethical vision" of the medical profession, spurred on by "advances in science" that led doctors to question previous distinctions between quick and nonquick fetuses (p 30).

More interestingly, the nineteenth century anti-abortion movement was strongly supported by the women's movement.¹¹ For example, in their journal, *The Revolution*, Elizabeth Cady Stanton and Susan B. Anthony frequently denounced the practice of abortion as "child murder," "infanticide," and a "horrible crime," and editorialized that "[w]e want *prevention*, not merely punishment. We must reach the root of the evil, and destroy it."¹² Stanton and Anthony attributed the prevalence of these practices to the fact that:

We are living today under a dynasty of force; the masculine element is everywhere overpowering the feminine, and crushing women and children alike beneath its feet. Let woman assert herself in all her native purity, dignity, and strength, and end this wholesale suffering and murder of helpless children.¹³

Tribe calls it "[i]ntriguing[]" that "abortion rights . . . were not really on the agenda of the early feminists" (p 33). It is even more intriguing that they were on the opposite side.

It may be the lack of historical evidence in support of the thesis that abortion laws are a product of discriminatory intent that leads Tribe to the most unattractive part of his argument: his ef-

¹¹ See Linda Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* 108 (Penguin, 1976) (virtually all nineteenth century feminists "condemned abortion" and believed in "the necessity of stopping its widespread practice"); Degler, *At Odds* at 243 (cited in note 10) (same). In her study *Man's Inhumanity to Woman, Makes Countless Infants Die: The Early Feminist Case Against Abortion* (1991), Mary Elizabeth Derr collects anti-abortion writings by fifteen prominent nineteenth century feminists. These statements are frequently quoted by pro-life feminists today. See, for example, Brief of Feminists for Life of American Professional Women's Network, et al, as Amici Curiae in *Bray v Alexandria Women's Health Clinic*, No 90-985 (filed Apr 11, 1991).

¹² *Maternity and Marriage*, 1 *The Revolution* 4, 4 (July 8, 1869). The main thesis of the editorial was that men, rather than women, are principally to be blamed for the crime of abortion:

Guilty? Yes, no matter what the motive, love of ease, or a desire to save from suffering the unborn innocent, the woman is awfully guilty who commits the deed. It will burden her conscience in life, it will burden her soul in death; but oh! thrice guilty is he who, for selfish gratification, heedless of her prayers, indifferent to her fate, drove her to the desperation which impelled her to the crime.

Other editorials on abortion include *Infanticide and Prostitution*, 1 *The Revolution* 1 (Feb 5, 1868); *Child Murder*, 1 *The Revolution* 10 (Mar 12, 1868).

¹³ 1 *The Revolution* 4, 57-58 (Jan 29, 1868).

fort to impugn the sincerity and motivations of modern opponents of abortion. "Whether in the name of traditional sex roles or in the name of a traditional sexual morality," Tribe asserts, "much opposition to abortion" is not rooted in the desire to protect the fetus, but "seems really to be about the control of women" (p 238). Tribe cites a study showing that "right-to-life activists" tend to "believe that men and women are different by nature and that they have intrinsically different roles to play in society" (p 237)¹⁴—which is probably true in a technical sense, but hardly blameworthy; even a substantial body of feminist scholarship supports the proposition that women typically have a different perspective, based on the female role in nurturing.¹⁵ Tribe, however, takes the further step of equating this perspective with the "desire that women be put back in their traditional roles" (pp 237-38). Pro-life advocates take this position, he says, either because they believe that "the economic and social freedom of women [is] the root cause behind abortion" or because they believe that "abortion rights [free] women to lead lives as full participants in the economy and in public life," a result that, Tribe infers, pro-life advocates would abhor (id). Tribe thus concludes that the pro-lifers' supposed reverence for life is sometimes only a "mask for the desire to preserve the power that some of us wield over others, that men in particular wield over women" (p 231); "the opposition to women's having the right to choose to end a pregnancy is more about the control of women than about the sanctity of life" (p 241).

Without this hostile characterization of anti-abortion motivations, Tribe's equal protection argument loses much of its plausibility. On Tribe's assumption that "the fetus . . . is . . . a person" (p 135), the more natural implication of the Equal Protection Clause is that it stands *against* abortion rights. The Equal Protection Clause is designed to protect members of vulnerable and politically unrepresented minorities from the oppressive measures of the dominant majority. Abortion laws are designed to protect fetuses or unborn children, surely a vulnerable and unrepresented group, from private violence.¹⁶ It is an odd interpretation of the

¹⁴ Tribe's source is Kristin Luker, *Abortion and the Politics of Motherhood* (California, 1984).

¹⁵ The leading work is Carol Gilligan, *In a Different Voice* (Harvard, 1982). See generally Robin West, *Jurisprudence and Gender*, 55 U Chi L Rev 1 (1988).

¹⁶ Even Tribe does not deny that this is the *principal* motivation for opposition to abortion. His only claim is that "antiabortion sentiment is not *entirely* rooted in a belief that abortion constitutes the killing of an innocent human being" (p 232) (emphasis in original).

Equal Protection Clause to say that it *prevents* states from extending protection to the vulnerable and unrepresented.

The claim that abortion laws are an instrument of control by men over women is the linchpin of Tribe's argument. Yet he seems surprisingly unconcerned with the evidence about the interplay between opinions about abortion and opinions about the role of women in society. More nuanced observers have noted that the abortion debate reflects a struggle *between and among women* over the best understanding of their interests, more than a conflict between Tribe's stereotypical dominating males and subordinated females.¹⁷

One would never know from Tribe's account that, by a slight margin, more men than women support abortion rights, or that women are more likely to view a fetus as a baby and to favor restrictions on legal abortion.¹⁸ In itself, this proves nothing about the merits of the issue, but it is so strikingly at variance with Tribe's account of the politics of abortion—and with the popular impression of abortion rights as a "women's issue"—that it calls for some explanation.

The male support for abortion is easy to understand. At best, it is a manifestation of the oft-noted tendency (not peculiar to males, but more common among them) to view decisions in terms of rights-centered, individualistic autonomy. To this ideological propensity must be added the element of self-interest; men frequently wish to avoid the responsibilities of unintended parenthood. In Mary Zimmerman's famous study of women who have undergone abortions, she found that men who were informed

¹⁷ The best analysis of this is Faye D. Ginsburg, *Contested Lives* 6-7 (California, 1989), an in-depth study of the worldview of women involved in pro-life and pro-choice advocacy in Fargo, North Dakota.

¹⁸ Hyman Rodman, Betty Sarvis, and Joy Walker Bonar, *The Abortion Question* 142 (Columbia, 1987) (in three of four polls analyzed from 1974 to 1986, more men than women supported abortion); The Gallup Organization, *Abortion and Moral Beliefs: A Survey of American Opinion*, Executive Summary, Figure 19 at 21 (1991) (showing that slightly more men than women approve of abortion during the first three months of pregnancy no matter what the reason for the abortion); Dan Balz, *Poll Finds Majority in U.S. Back Abortion Rights*, Wash Post A6 (Oct 7, 1989) (males aged 35-44 support abortion rights more than any other segment of the population); Linda Bird Francke, *The Ambivalence of Abortion* 33 (Random House, 1978) (reporting Australian study that 60 percent of women and 36 percent of men believe life begins at conception). This male-female differential predates the decision in *Roe*. See Judith Blake, *The Supreme Court's Abortion Decisions*, in Edward Manier, William Liu, and David Solomon, eds, *Abortion: New Directions for Policy Studies* 45, 51 (Notre Dame, 1977). It is also noteworthy that female doctors are more likely to have moral qualms about performing abortions than male doctors. See Francke, *The Ambivalence of Abortion* at 40.

of the pregnancy supported their partner's initial decision to abort by a 2-1 margin, while opposing the initial decision to bear the child by a margin of 8-1.¹⁹ At worst, the availability of abortion makes it easier for men to engage in sex without risking any consequences—reason enough for abortion rights to be enshrined among the tenets of the Playboy Philosophy.²⁰

Women's attitudes toward abortion, both for and against, are often more complex. Even those who favor abortion rights often understand the act as the taking of a human life, and feel grief, pain, and responsibility for it.²¹ In contrast to Tribe's antiseptic and abstract treatment of the phenomenon, some of the most graphic and heart-rending accounts of the abortion experience have come from women who nonetheless continue to support the right to choose.²² Other women, no less committed to an equality of rights, oppose abortion because they perceive it to be based on a male-centered ideology in which the man's freedom from pregnancy and childrearing is held up as the human ideal and the woman's pregnancy is treated as an occasion for medical intervention. As feminist pro-life psychologist Sidney Callahan notes,

¹⁹ Mary Zimmerman, *Passage Through Abortion: The Personal and Social Reality of Women's Experiences* 122 (Praeger, 1977). Francke reports that a pregnant woman often hopes that the man will talk her out of the abortion and is resentful when he supports her decision. Francke, *The Ambivalence of Abortion* at 96, 100, 107 (cited in note 18).

²⁰ Tribe may not have noticed it, but women writing on the subject of abortion from a variety of perspectives have drawn similar conclusions about the support for abortion rights among men. Writing shortly before *Roe*, demographer Judith Blake commented that "upper-class men have much to gain and very little to lose by an easing of legal restrictions against abortion. . . . [T]heir sexual freedom has been curtailed, both within marriage and outside it, by restrictions on contraception and pregnancy termination, since as a class they are especially vulnerable to being held financially and socially responsible for accidental pregnancies. For this reason, they are likely to favor a lessening of those restrictions." Judith Blake, *Abortion and Public Opinion: The 1960-1970 Decade*, 171 *Science* 540, 544 (1971). Mary Ann Glendon has observed, "It does not take Sherlock Holmes . . . to discern why the strongest supporters of elective abortion are young men." Mary Ann Glendon, *Intra-Tribal Warfare*, *First Things* 55, 57 (Aug-Sept 1990). Commenting on the strong support for abortion rights by the Playboy Foundation, Catharine MacKinnon noted: "The availability of abortion . . . removes the one remaining legitimized reason that women have had for refusing sex besides the headache." Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in Jay L. Garfield and Patricia Hennessey, eds, *Abortion: Moral and Legal Perspectives* 45, 51 (Massachusetts, 1984).

²¹ See, for example, Magda Denes, *In Necessity and Sorrow* 57, 60-61, 89-90 (Basic, 1976); Francke, *The Ambivalence of Abortion* at 61, 64, 75, 84, 90, 99-100, 222, 235 (cited in note 18); Zimmerman, *Passage Through Abortion* at 195 (cited in note 19); McDonnell, *Not An Easy Choice* (cited in note 7); Sue Nathanson, *Soul Crisis: One Woman's Journey Through Abortion* (New Am Library, 1989).

²² See S. Nathanson, *Soul Crisis* (cited in note 21); Denes, *In Necessity and Sorrow* (cited in note 21).

"[a]bortion helps a woman's body be more like a man's."²³ Feminist anthropologist Faye Ginsburg found that women active in the pro-life movement most commonly see their efforts as a "defense of female nurturance against male self-interest."²⁴ She quotes a sidewalk counselor as saying, "I view it [abortion] as the rape of motherhood, of the gender, of the uterus, of the womb."²⁵

Tribe persistently assumes that the abortion question presents a bipolar opposition of mother to child, pregnant woman against fetus, apparently unaware that much of the pro-life movement sees itself as devoted to the woman's interests as well as the child's. Pro-life activists worry that the atomistic ideology of abortion rights is contrary to the interests and perspective of most women. Under the abortion rights framework, childbirth and childrearing become not only the woman's choice but also her problem. What claim can she make on her male partner, or on the wider society, if the bonds of obligation and responsibility are purely a matter of "choice" and the "choice" is hers alone? In Sidney Callahan's words, "[p]ermissive abortion, granted in the name of women's privacy and reproductive freedom, ratifies the view that pregnancies and children are a woman's private individual responsibility. More and more frequently, we hear some version of this old rationalization: if she refuses to get rid of it, it's her problem."²⁶ Tribe's unquestioning acceptance of pro-choice thinking causes him to overlook the wider cultural and moral implications of abortion rights for women. No longer is the occupation of childbirth and nurture wrapped in the sacred web of mutual obligation. Now it is exposed to the callous realm of individualism, self-interest, and choice. Children will continue to be born into the world, because women will continue to choose to have children. But the logic of the pro-choice position means that men are off the hook.

None of this is to deny that some opposition to abortion may stem from an antipathy to the participation of women in economic and public life outside their traditional roles—just as some support for abortion rights stems from male sexual adventurism and some from a racist desire to control the population of minorities and welfare recipients.²⁷ But Tribe's version of the story—that laws

²³ S. Callahan, *Abortion & the Sexual Agenda* at 238 (cited in note 7).

²⁴ Ginsburg, *Contested Lives* at 215 (cited in note 7).

²⁵ *Id.* at 99.

²⁶ S. Callahan, *Abortion & the Sexual Agenda* at 236 (cited in note 7).

²⁷ See, for example, *Doctor's Abortion Business Is Lucrative*, San Diego Union B1 (Oct 12, 1980), quoting Dr. Edward Allred, a doctor whose clinic performs approximately 60,000 abortions each year, as arguing:

against abortion stem from the male desire for control over women—at best oversimplifies the social reality, in which abortion is often the ally of male irresponsibility, and misconceives the moral position of the anti-abortion movement, which is in significant part a woman's movement based on the perceived joint interests of mother and child. His claim that contrary views should be considered the "subordinat[ion of] women" (p 128) is an insult to the many women (and men) who see the world through different eyes.

I confess to finding Tribe's legal argument less than compelling. But I am more troubled by his tone than his argument. Many respected constitutional scholars have developed theories that, they think, shore up *Roe*'s unstable doctrinal foundation and legitimate the legal argument that abortion rights are protected by the Constitution. Tribe's is no weaker than most. But Tribe makes a bolder claim for his analysis: "it is vital, morally vital," he says, "to see the force of the argument that an amendment to our Constitution would be required" to treat the unborn as persons under the law (p 128; emphasis omitted); a decision "retreat[ing] from *Roe*" would be legally "indefensible" (p 128-29). With all respect, I do *not* think it is "morally vital" to agree or "indefensible" to disagree with Tribe's rather strained legal analysis. Is this the way to promote mutual exchange and understanding about abortion?

III.

The question naturally arises: does Professor Tribe *want* to bridge the gap between the clashing absolutes? One would expect a person in Tribe's position to try to convince pro-lifers that the logic of their position would allow much greater latitude for legal abortion than they have been willing to recognize. Oddly, Tribe does just the opposite. At the key junctures in the book, he seeks to persuade the pro-life reader that it is unprincipled to take anything but the most absolute position.

According to Tribe, once we accept the proposition that a fetus is a human being, "the state would be compelled to treat all

Population control is too important to be stopped by some right-wing pro-life types. Take the new influx of Hispanic immigrants. Their lack of respect of democracy and social order is frightening. I hope I can do something to stem that tide; I'd set up a clinic in Mexico for free if I could. . . . The Aid to Families With Dependent Children program is the worst boondoggle ever created. When a sullen black woman can decide to have a baby and get welfare and food stamps and become a burden to all of us it's time to stop.

abortion as *murder*" (p 121; emphasis in original). Even an exception to save the life of the mother is unjustified (p 122). And it would be "untenable" (p 122) for pro-lifers to treat the mother as a co-victim of the abortion; she must "at least be liable to criminal punishment for attempted murder or for aiding and abetting the physician who performed the deed" (p 122). A rape exception, similarly, cannot be squared with the belief that abortion constitutes the killing of an innocent human being. "It is hard to see how any such justification for limiting abortion could plausibly be put forward by anyone who thinks that abortion should be permitted in cases of rape" (p 232). Nor can a pro-lifer accept a later point in the pregnancy at which to begin protection for the fetus. "No one who objects to *Roe* on the basis that every embryo is an unborn baby from the moment of conception can find much comfort in a rule that routinely sacrifices unborn babies under the age of two or three months in order to save some of those who are older" (p 208). In fact, Tribe seeks to persuade his pro-life readers that the very idea of compromise is immoral:

Agreements to disagree, and to cut things down the middle in the name of civil peace, have undoubted appeal . . . but the appeal is a necessarily limited one when it buys only a little peace and when the 'things' that are being cut down the middle are not things at all but people or at least beings that many will continue to regard as people (p 208).

Of course, many people who are philosophically committed to the protection of the unborn support these and other intermediate positions. It is not a logical contradiction for a person to recognize that life presents hard choices and that principles—even important principles—must be accommodated to other principles, which are also important. Pro-lifers are unalterably convinced that the state should extend some form of protection to these helpless, innocent beings—but the form that protection should take depends, in part, on questions of excuse, justification, compassion (most pro-lifers view the aborted woman as co-victim), degrees of moral culpability (often, in this context, ambiguous), appropriateness of the criminal sanction, and prudence. In the extreme, one could even imagine a pro-life policy that depended primarily on public education and counseling. This would obviously not satisfy the strongly pro-life element, but from their perspective it should be preferable to a situation in which the government sanctions and encourages the practice of abortion by treating it as a constitutional right rather than as a difficult-to-regulate civil wrong.

Notwithstanding Tribe's disavowals, there *are* areas of "common ground" (p 7)—measures that should be supported by pro-choice advocates no less than pro-life advocates. One such area is the requirement of genuine counseling and informed consent.²⁸ While many women reach a firm conclusion about abortion before ever entering the clinic, there is evidence that a large number of women enter the clinic seeking guidance rather than rapid processing. Almost all are anxious and vulnerable; many are "confused during most of the decision-making period";²⁹ some do not wish to terminate their pregnancy but need help and do not know where to get it; many are vacillating about the decision right up to the point of no return; many feel grief and guilt and regret, often for many years, after making too hasty a decision.³⁰

It is generally conceded that the "counseling" provided by abortion clinics is often deficient.³¹ Abortion counseling is designed to be reassuring rather than informative or challenging.³² Counselors are usually ideologically or financially committed to supporting abortion. Even the better counselors apparently do not provide accurate information about the gestational age and characteristics of the fetus the patient is carrying, engage in serious moral dialogue about abortion, provide information about the availability of material assistance if she carries the child to term, prepare the patient for the psychological effects of abortion, or attempt to combat the common misinformation and prejudice about adoption.³³ All too

²⁸ See Terry Steinberg, *Abortion Counseling: To Benefit Maternal Health*, 15 Am J L & Med 483 (1989) (pro-choice argument for improved counseling); Colker, 77 Cal L Rev at 1061-71 (cited in note 7) (advocating requiring that abortion providers make available group counseling sessions at which women seeking abortions would be "exposed to competing viewpoints").

²⁹ Zimmerman, *Passage Through Abortion* at 143 (cited in note 19). Zimmerman estimates that 35 percent of the women in her study were "confused." Studying available first-person accounts, Burtchaell comments that "[a] theme that runs like a leitmotiv through these tales is incoherence." Burtchaell, *Rachel Weeping* at 3 (cited in note 7). See also Francke, *The Ambivalence of Abortion* at 47 (cited in note 18).

³⁰ See S. Nathanson, *Soul Crisis* (cited in note 21); David C. Reardon, *Aborted Women: Silent No More* (Loyola, 1987); Kenneth McAll and William P. Wilson, *Ritual Mourning for Unresolved Grief After Abortion*, 80 Southern Med J 817 (1987).

³¹ See McDonnell, *Not an Easy Choice* at 39 (cited in note 7); Colker, 77 Cal L Rev at 1061-71 (cited in note 7); Burtchaell, *Rachel Weeping* at 41-45 (cited in note 7). Linda Bird Francke quotes one patients' advocate as saying "[c]ounselors are just to give the appearance of help." Francke, *The Ambivalence of Abortion* at 25 (cited in note 18).

³² Francke, *The Ambivalence of Abortion* at 31 (cited in note 8); Burtchaell, *Rachel Weeping* at 43 (cited in note 7). See *Planned Parenthood of Missouri v Danforth*, 428 US 52, 91 n 2 (1976) (Stewart concurring) (record showed that the counseling included only "a description of abortion procedures, possible complications, and birth control techniques").

³³ Kathleen McDonnell reports that "adoption is no longer treated as a serious option by many counsellors working with abortion." McDonnell, *Not an Easy Choice* at 78 (cited in

often women uncertain about pregnancy and their options are rushed by profit-making abortionists to a quick decision, which many of them later regret, without the information on which to make an informed choice.³⁴ No one concerned about the well-being of women (let alone the unborn) could defend these practices, and it is naïve to think that abortion clinics, whose profit margins depend on rapid processing of large numbers, will reform themselves.

Tribe makes no mention of deficient counseling, except to disparage volunteer crisis pregnancy centers (p 171), and he opposes waiting periods. His objection, in addition to cost considerations, is that these measures are simply "propaganda" for the notion that "women routinely make grave decisions about abortion rashly and that they will think better of the idea if only they are sent away from the clinic and told to sleep on it" (p 204). I imagine that Tribe would think better of his opposition if he were more familiar with the facts. As Kathleen McDonnell has stressed, abortion is "not an easy choice," and women facing this decision are often in need of help. Mandatory information and waiting periods are a common form of consumer protection when the consequences of a decision are significant and irrevocable. If the clinics were selling cars, not abortions, Tribe would be on the other side of the issue.

Another potential area of common ground, not addressed by Tribe, is the need to protect women who would prefer to carry the child from the coercion of boyfriends, husbands, parents, or others.³⁵ The dark side of "choice" in the area of abortion—like

note 7). This is a particularly unfortunate lapse, for in the majority of cases, the woman's reason for obtaining an abortion is related to the anticipated difficulties of childrearing (often without a father's help) rather than to pregnancy, but women seeking abortions typically reject the adoption alternative out of hand, frequently on the basis of misconceptions and misinformation. See Burtchaell, *Rachel Weeping* at 23-26 (cited in note 7).

³⁴ For a compilation of the personal accounts of many women in these circumstances, see Reardon, *Aborted Women* (cited in note 30). For journalistic depictions of the shocking character of abortion "counseling" in two American cities, see Pamela Zekman and Pamela Warrick, *Soft Voices, Hard Sells—Twin Swindles*, Chi Sun-Times 21 (Nov 13, 1978); Debbie Sontag, *Do Not Enter*, Miami Herald 8 (Sept 17, 1989).

³⁵ It is impossible to know how often this takes place, but that it does take place seems undeniable. According to Kathleen McDonnell, the phenomenon of men coercing women to obtain abortions "happens more often than many people realize, not because men force women kicking and screaming into hospitals and abortion clinics, but because women's economic and emotional dependence on men can make them unable to carry out their own wishes." McDonnell, *Not an Easy Choice* at 64 (cited in note 7). Mary Zimmerman reports that 30 percent of the women who had abortions in her study wanted to bear the child; 20 percent "chose" the abortion as a result of the opposition of the man. Zimmerman, *Passage Through Abortion* at 110, 122 (cited in note 19). For personal stories of women coerced into abortion, see Reardon, *Aborted Women* at 11, 78-79, 82-84 (cited in note 30).

"choice" about euthanasia, underage sex, performance in pornography, participation in prostitution, and other "rights" that might be extended to vulnerable persons—is that the removal of official sanctions creates space for private pressure and subtle coercion. Improved counseling, waiting periods, and information about legal rights and available material assistance would help, but this is a problem that needs much more attention.

Another area of possible compromise is to establish cut-off dates for abortion somewhere between the extremes of conception and birth. For abortion opponents, such compromises would be difficult, but they might well offer the basis for a stable consensus. Most pro-lifers are more committed to the proposition that the legally sanctioned killing of innocent human life is immoral than they are to the proposition that human life begins at conception. The protection of innocent human life is a moral imperative; the determination that a particular creature *is* a human being leaves more room for scientific and philosophical argument.

There is a serious moral argument that implantation rather than fertilization is the point at which legal protection should begin (about 14 days),³⁶ and some thoughtful persons have suggested the existence of neurological functions ("brain waves") as a sensible definition of the beginning of life. This would be at about 40-70 days gestational age.³⁷ Another plausible place to draw the line is

³⁶ See Bernard N. Nathanson, *Aborting America* 216-17 (Doubleday, 1979). This is the time at which nature begins to take great care to protect the new organism. Prior to implantation, at least 40 percent of fertilized eggs naturally miscarry (Tribe puts the figure at two-thirds (p 123)); after implantation, the number declines to 20 percent. Hursthouse, *Beginning Lives* at 341 (cited in note 7). This is also past the point when exotic developments like monozygotic twinning and embryo merger (which cast doubt on the theoretical "personhood" of the zygote) cease. See James J. Diamond, *Abortion, Animation, and Biological Hominization*, 36 *Theol Stud* 305 (June 1975). The practical significance is that defining the point of legal protection to occur at implantation would not interfere with the use of IUDs, the abortifacient properties of currently available contraceptive pills, or the hormonal treatment of rape victims. The German Constitutional Court has held that constitutional protections for the fetus begin at this point. *Entscheidungen des Bundesverfassungsgerichts* [BVerfG] 39, 1 (1975), translated in Robert E. Jonas and John D. Gorby, *West German Abortion Decision: A Contrast to Roe v. Wade*, 9 *John Marshall J Prac & Proc* 605, 610 (1976).

³⁷ See *Scholar Proposes "Brain Birth" Law*, *NY Times* A28 (Nov 8, 1990) (describing model legislation drafted by philosopher Hans-Martin Sass, which would extend legal protection to fetuses at a point when integrated brain functioning begins to emerge, which Sass sets at about seventy days after conception). Isolated brain waves have been detected at about forty days after conception. Hannibal Hamlin, *Life or Death by EEG*, 190 *J AMA* 1, 12, 113 (Oct 12, 1964). Use of brain wave activity to determine the beginning of protectable life has the advantage of symmetry, since the absence of neurological activity is the leading medical indicator of death. *Id.*

the point (about 8-10 weeks) at which all the major organ systems have come into being and the fetus assumes a distinctively human appearance, with tiny arms and legs, fingers and toes.³⁸ Approximately half of all abortions occur *after* eight weeks (p 215), and it is these abortions that fuel the most intense opposition.

Strong pro-lifers may not be fully satisfied with such definitions, but from their perspective it would be better for the state to commit itself to the protection of human life (even if it is wrong about the fact of when life begins) than to permit abortions without regard to the question. Society has no choice but to decide to whom it will extend protection. It is not helpful to call this decision "private," for there is no more inherently political question than the definition of the political community. When the *Roe* Court stated, "[w]e need not resolve the difficult question of when life begins,"³⁹ it was deciding the question without admitting it, and thus without having to support its decision with reasons. Worse yet, it was suggesting that the question of human life was irrelevant to the decision. Any conscientious determination of when the developing fetus attains a moral-legal status worthy of protection, supported by reasons, would be preferable to that. But *Tribe* dismisses any effort to reach a reasoned determination on the ground that any definition "is inherently arbitrary to some degree" (p 208), as if that were grounds for refusing to give the best answer we can.

Tribe half-heartedly defends the *Roe* Court's focus on fetal viability (p 208).⁴⁰ But this is one of the least plausible alternatives. The theory is that at viability the fetus can survive on its own (with the help of extraordinary medical intervention). In fact, most fetuses do *not* survive abortion even after viability.⁴¹ But paradoxically, if it were true that fetuses *did* routinely survive abortion af-

³⁸ T.W. Sadler, *Langman's Medical Embryology* 73 (Williams & Wilkins, 5th ed 1985). This is the point at which the embryo is properly called a "fetus." Hursthouse, *Beginning Lives* at 342 (cited in note 7).

³⁹ 410 US at 159.

⁴⁰ Although viability appears to be an important concept in *Roe*, this is somewhat misleading. The *Roe* opinion holds that states may not interfere with abortions after viability if the abortion is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id* at 165. In the companion case, *Doe v Bolton*, 410 US 179, 192 (1973), the Court interpreted "health" to include "all factors—medical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." Under this interpretation, the only genuine restraint on post-viability abortions is medical, not legal. Nonetheless, very few abortions occur after this point.

⁴¹ The survival rate at 24-25 weeks, "despite the most sophisticated care, is about 10 percent." Hursthouse, *Beginning Lives* at 343 (cited in note 7).

ter viability, that would not, logically, be a reason to forbid abortions, because it would mean the abortion (that is, the termination of pregnancy) could be accomplished without the taking of human life. If viability really meant survivability, it would suggest exactly the opposite from Tribe's conclusion: women should be free to terminate their pregnancies at will after viability, so long as their doctors take proper steps to protect the life of the premature infant. Only prior to viability is there a strong justification for prohibiting the termination of pregnancy, because before that point it is not possible to terminate the pregnancy without killing the child.

On the other hand, if (as is actually the case), viability does not really mean survivability, it carries no moral weight. Apart from its connection to a distinction between abortion-as-termination-of-pregnancy and abortion-as-killing-the-fetus, which cuts against Tribe's position, viability has no bearing on the appropriateness of abortion in the particular case. Viability depends entirely on the technology at a given time and place and not on any characteristic of the fetus; the moral-legal status of a being should not depend on such contingent factors. The emerging consensus, even among pro-choice scholars, other than Tribe, is that "'viability' is becoming increasingly irrelevant to the abortion debate."⁴²

A related, but logically distinct, approach to compromise is based on the position that the fetus, while not fully a human being, is nonetheless sufficiently close that it is deserving of moral respect and legal protection. Tribe does not seriously consider this possibility. Under this view, abortion is *not* "murder"; nor, however, is it a private act with which society has no legitimate interest. This understanding would account for the fact that, for most Americans, the circumstances and reasons for the abortion matter. Sufficiently devastating consequences to the mother and to her already-existent family are often thought to justify abortion. This would not likely be true if the fetus were recognized as a fellow human being. Where the consequences of pregnancy are less severe, abortions are more commonly thought unjustified. This would not likely be true if the fetus were recognized as a clump of tissue, without any moral rights at all. Yet oddly, Tribe assumes that the

⁴² McDonnell, *Not an Easy Choice* at 45 (cited in note 7). See also Colker, 77 Cal L Rev at 1057 (cited in note 7) ("[t]he Roe Court's use of 'viability' as a basis for distinguishing permissible abortion regulations from impermissible abortion regulations is . . . misplaced"); Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 Const Comm 75, 80-85 (1991) (calling use of viability to distinguish between permissible and impermissible abortions "incoherent").

case for nearly absolute abortion rights is made if the case for nearly absolute fetal rights is rejected. In logic textbooks, this is called the fallacy of the excluded middle.

At the same time that he discourages pro-life readers from embracing intermediate positions, Tribe opposes compromises from the pro-choice position for no apparent reason other than that they are compromises. For example, he does not think there are very many sex-selective abortions and does not provide any moral or legal defense for them. Nonetheless, he is opposed to prohibiting them, on the ground that "those who draft such legislation are simply trying to exploit the widespread opposition to certain uses of abortion as a back-door path to their goal of outlawing abortion altogether" (p 205). Similarly, he agrees that any particular cut-off point for the legality of abortion (including the point chosen by the *Roe* Court) is "inherently arbitrary to some degree" (p 208), but he states that a pro-choice person could not support an earlier date as a legislative compromise because that would be "a fairly blatant exercise in vote trading" (p 208).

IV.

At this point, I begin to suspect that Professor Tribe is indulging in political calculation. The threat to the current regime of abortion on demand does not come from pro-life extremists, who are a distinct minority and who have failed to carry the day with many of their fellow citizens. The threat comes, instead, from the fact that a clear majority of the American people supports significant restrictions on the abortion right. It turns out that, for most Americans, abortion is not a "clash of absolutes"; it is an occasion for prudent and humane solutions, which by necessity will avoid the extremes.⁴³

⁴³ Sociologist Mary Ann Lamanna summarizes a large number of polls from the early 1970s through the early 1980s as showing that "[a]lmost 20% support the prolife position, defined as forbidding abortion under any circumstances except to save the mother's life," and "[a]bout 25% support prochoice as defined in *Roe v. Wade*." Mary Ann Lamanna, *Social Science and the Ethical Issues: The Policy Implications of Poll Data on Abortion*, in S. Callahan and D. Callahan, eds, *Abortion: Understanding Differences* 1, 4 (cited in note 7). She notes that these results are "consistent across researchers and time periods," id, and that they suggest "a consensus on abortion on the part of the American public." Id at 3. Other studies of polling data reach similar conclusions. See, for example, Condit, *Decoding Abortion Rhetoric* at 147-51, 167-68, 170 (cited in note 7); Rodman, Sarvis, and Bonar, *The Abortion Question* at 137 (cited in note 18); George Gallup and Frank Newport, *Americans Shift Toward Pro-choice Position*, *The Gallup Poll Monthly* 2 (Apr 1990) (1990 survey; 31 percent favor abortion for any reason); Ethan Bronner, *Most in US Favor Ban on Majority of Abortions*, *Poll Finds*, *Boston Globe* 1 (Mar 31, 1989); James Davison Hunter and Carl

Most people disapprove of the legal regime of abortion on demand. But that is the status quo, and it requires effective political mobilization for any group, even a numerical majority, to change the status quo. Most people also disapprove of the extreme pro-life position.⁴⁴ Many people believe that fetuses have moral value and should receive legal protection, but do not agree that they are fully equal to human beings. Huge majorities support the availability of abortion in the extreme cases of rape and incest, serious threat to the life or health of the mother, and serious (especially life-threatening) defects in the child. Most believe that abortion should not be outlawed during the early weeks of pregnancy. The precise stage at which public opinion shifts in favor of protecting the fetus is hard to identify, but it is probably no earlier than implantation (about two weeks) and no later than the time at which organ systems are established, brain waves are detectable, and the fetus assumes an unmistakably human form (about 8-10 weeks).⁴⁵ Before that time, the public seems to favor broad latitude; after that time, the public seems to favor protection, with exceptions only in the extreme cases.⁴⁶ In any event, the public appears to favor improved counseling and waiting periods to avert pressure and ensure full knowledge and informed consent, as well as parental notification in the case of pregnant teenagers.⁴⁷ And to the public, it makes a dif-

Bowman, 1 *Gallup Organization Survey on the Abortion Controversy in America* 2-3 (1990).

⁴⁴ According to a recent New York Times/CBS News poll, 58 percent of Americans regard proponents of either or both sides as extremists, and 19 percent consider both sides in this category. E.J. Dionne, Jr., *Poll Finds Ambivalence on Abortion Persists in U.S.*, NY Times A18 (Aug 3, 1989).

⁴⁵ For the medical details, see notes 36-38 and accompanying text. Interestingly, Linda Bird Francke reports that women who have had abortions in the first trimester tend to "discuss their abortion experience in terms of 'the pregnancy' or 'the fetus,'" while those who have had abortions later "use such terms as 'the baby' or 'the child.'" Francke, *The Ambivalence of Abortion* at 83 (cited in note 18).

⁴⁶ A later date is possible. Nothing in the discussion here depends on the details.

⁴⁷ Tribe strongly opposes parental notification requirements for teenagers, saying that this is the "clearest example, the example on which we have the best data," of compromise measures failing to reduce the number of abortions and having only unintended, and "horrible," consequences (pp 209-10). For all his talk of data, however, Tribe cites only a news story in *U.S. News and World Report*, from which he concludes that "changes in the rates of pregnancy, abortion, and childbirth among teenagers covered by the [Minnesota parental notification] law during the time it was in effect were little different from the changes in those rates among eighteen- and nineteen-year-olds whom the law did not cover" (p 209). (Interestingly, the story also debunks the claim by opponents of parental notification that the law has various dire side-effects, but Tribe does not mention that.) According to a study in the *American Journal of Public Health*, however, "[t]he pre-enactment to post-enactment decline [in abortion rates in Minnesota] was substantially greater for 15-17 than 18-19 year-old women," while birth rates declined for both groups at about the same rate. Late-term as

ference whether the abortion is sought for substantial reasons, or if it is being used as a form of birth control. If allowed by the courts, there could be significant variations in the approaches taken from state to state.

An abortion law based on these ideas might not be ideal from my point of view (or Tribe's), but it would not be unthinking or unprincipled, let alone unconstitutional. Perhaps most threatening from Tribe's perspective, it would be politically feasible. If legislative authority over abortion is returned to the states and the American public and their legislators begin to engage in serious discussion of the abortion question, something very like this is the most probable outcome.

This may explain the political strategy of *Abortion: The Clash of Absolutes*. If the American public were persuaded (contrary to their own sense of the matter) that there are no plausible, intermediate positions between the status quo and the uncompromising pro-life position, they would choose the status quo. There is little doubt about that. The solution to the political problem, then, is to do one's utmost to avoid serious, substantive discussion of the law and morality of abortion, for this discussion would reveal that intermediate solutions are possible. It is to condemn all thought of compromise, since compromise would constitute a retreat from *Roe*. It might even be good strategy to be openly unfair to advocates of the pro-life position, because this could serve to radicalize them, cause them to take a more extreme position, and thus stave off the day when a moderate and humane reform of abortion law is possible. But it is not a sound strategy for a book that claims to seek "common ground" between the two absolutes. Whether this book is a failure or a success depends entirely on its real objective.

well as early-term abortion rates declined, and the researchers found little evidence that Minnesota teenagers were traveling to other states to avoid the law. James L. Rogers, et al, *Impact of the Minnesota Parental Notification Law on Abortion and Birth*, 81 Am J Pub Health 294, 295-96 (1991). While statistics of this sort cannot prove causation, the researchers found the data "compatible with the hypothesis that, initially, parental notification facilitated pregnancy avoidance in 15-17 year-old Minnesota women." Id at 296.