

BOOK REVIEW/ESSAY

ABORTION: THE CLASH OF ABSOLUTES. By Laurence H. Tribe. New York: W. W. Norton & Company. 1990. Pp. xiv, 259. \$19.95.

*Reviewed by David K. DeWolf**

As a renowned constitutional scholar and lawyer, Laurence Tribe garners the attention of many, including the judiciary, when he speaks or writes. His frequent, usually successful, appearances before the United States Supreme Court have earned him a reputation as a formidable advocate as well as a scholar. In another recent book, *God Save This Honorable Court*,¹ he traded traditional scholarship for a popular format, taking his constitutional views to a larger audience.

His latest book, *Abortion: The Clash of Absolutes (Abortion)*, will be read by those who are in search of answers to the troubling questions about how the legal system, particularly the Supreme Court, should treat abortion. Like his earlier work, *Abortion* purports to be a fair-minded, objective appraisal of a controversial subject.² Indeed, the title and the chapter headings³ suggest that he is attempting to find a reasonable middle ground

*Assistant Professor of Law, Gonzaga University School of Law. B.A., Stanford University, 1971; J.D., Yale Law School, 1979. The author gratefully acknowledges the editorial assistance and textual additions of Judith A. Butler, principal, Lukins & Annis, P.S., Spokane, Washington. B.A., Gonzaga University, 1968; J.D., Gonzaga University School of Law, 1980.

1. L. TRIBE, *GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY* (1987).

2. Nonetheless, Tribe betrays his sympathies not only by the substance of the book but through the characterization of the participants in the debate. For example, Tribe often uses the term "conservative" to describe a position or person (e.g., p. 96, in reference to Justice Scalia: "Writing for himself and for fellow conservative Justices," Or describing Judge Robert Bork as a "judicial conservative" (p. 90) or elsewhere as "an extremely conservative appointment" (p. 168)). Tribe is more sparing with the term "liberal" (he describes Brennan only as the Court's "most liberal" member (p. 12), and earlier characterized Blackmun as belonging to the "'liberal' wing" of the Court (p. 11)—putting liberal in quotes). It is "conservative Senators James L. Buckley of New York and Jesse Helms of North Carolina," (p. 144) but just "Democratic Congressman Don Edwards" (p. 144). It is "conservative Republican Senator Orrin Hatch" (p. 162), but simply "Senator Edward Kennedy" (p. 166). From Tribe's perspective, apparently, conservatives are aberrational; liberals just look like normal people.

3. Chapter 9 is entitled "In Search of Compromise" and Chapter 10 is "Beyond the Clash of Absolutes."

between two poles of more or less comparable attraction.

Upon closer inspection, however, the book reveals itself as an extended brief in favor of the woman's right to abortion. In contrast to his carefully developed pro-choice arguments, which are accompanied by ringing moral conviction, Tribe states the pro-life position in much the same way that a court refers to arguments of the losing party that it finds unpersuasive. Indeed, perhaps the better analogy is the way in which a reply brief addresses the arguments made in the respondent's brief—every effort appears to be made to leave the reader with the feeling that there is only one logical outcome to the debate.

The structure of the book⁴ reflects Tribe's desire to appear objective, "to see new ways to understand the issue,"⁵ and to "maintain respect for the deepest values of both sides of the question."⁶ Tribe falls short of this goal, and disappoints the reader who expects an analysis by the scholar rather than the advocate. The historical overview of abortion is too sketchy to be of use. By tracing the presence of abortion in history, and throughout the world today, Tribe gives the impression that its existence is justified, despite the admission that "it appears generally in most cultures to be considered a 'wrong.'"⁷

The strange thing about the book as a whole is the lack of any passion generated for the pro-life position. There are numerous anecdotes personalizing women who suffered because of restrictions on the availability of abortion.⁸ On the other hand, the closest Tribe can come to making the

4. After a brief description of the *Roe* and *Webster* decisions (Ch. 2), he describes the history of abortion practices in the United States (Ch. 3) and abroad (Ch. 4). Then comes the heart of the book, an exposition of the pro-choice (Ch. 5) and pro-life (Ch. 6) positions. Tribe then discusses the "politics" of abortion, which Tribe describes as "From a New Right to the 'New Right'" (Ch. 7) and "The Pro-Life Advocates in Power" (Ch. 8), and concludes with "In Search of Compromise" (Ch. 9) and "Beyond the Clash of Absolutes" (Ch. 10).

5. P. 8.

6. P. 3.

7. P. 53.

8. For example, the "saddest of these stories" about parental consent and notification requirements is about Becky Bell, "a blond, blue-eyed former cheerleader" [Why are these attributes significant?] who could not bear to tell her parents, and died from complications of a "home remedy" abortion (p. 203). Or consider the experience of Kate Michelman, now the director of the National Abortion Rights Action League, which is recounted as a horror story of the oppressive effects of anti-abortion statutes: "I had to go before a panel of four strange men, whose decision was going to impact on the rest of my life, but who would not

horror of abortion palpable is to mention the “grisly color pictures of aborted fetuses” used by pro-life advocates—only to denounce such use as misleading.⁹ But the stories of women traumatized by abortion are missing.

One of the most difficult aspects of the abortion debate is the complex relationship between morality, legislative policymaking, and constitutional law. At each level there is a separate basis for debate. The first level concerns the *morality* of abortion—under what circumstances, if any, is it morally acceptable to take affirmative steps to kill a fetus?¹⁰ The second takes place at the level of *legislative* judgment—is it wise to enact regulations or restrictions on the practice of abortion, or for that matter, to subsidize it through programs such as Medicaid? The final level of the debate is *constitutional*—what limits are there on the legislative choice to regulate or restrict access to abortion? These three questions are quite distinct: one who believes that abortion is a moral wrong might very well disagree about the wisdom of statutory restrictions; and at the same time disagree with the assertion of constitutional protection for abortion. On the other hand, one might believe that abortion is a morally acceptable act, but think that statutory regulation is wise for the protection of society’s interests, and at the same time be persuaded of the constitutional protection for the right to abortion. In other words, each level may operate independently of the other two, and so the analysis must be kept separate. It will be suggested at the conclusion of this essay that one of the book’s most serious shortcomings is its failure to demonstrate an appreciation for the distinction between law and morality.

1. *Morality.* The centerpiece of Tribe’s discussion of the morality of abortion is an analogy borrowed from a 1971 article by Princeton philosopher Judith Jarvis Thomson.¹¹ Suppose, she suggested, you woke up one morning to find your circulatory system connected to a violinist who would die if you disconnected him. He would only need your assistance—the connection to your body—for nine months, but thereafter you would still have strong feelings toward him. Would you have the right to disconnect him?

have to bear the burden of raising four children” (p. 135).

9. P. 141.

10. The victim of an abortion is usually called a “fetus,” rather than “unborn child,” to avoid prejudging the issue of when the fetus becomes a “person.” However, the Latin word “fetus” simply means “offspring” or “unborn young.” AMERICAN HERITAGE DICTIONARY 260 (1983). Therefore, throughout this review “fetus” and “unborn child” will be used interchangeably.

11. P. 129. Thomson, *A Defense of Abortion*, 1 J. OF PHIL. & PUB. AFF. 47 (1971).

There are imperfections in the analogy,¹² but it serves as a useful discussion vehicle. Tribe uses the analogy to make what he thinks is a devastating point: even if you think the fetus is a person, that doesn't mean that you have a right to *force* someone to be a good Samaritan to help him.¹³ Moreover, Tribe argues, it is a form of discrimination against women that we make only them bear the burden of pregnancy. Thus, Tribe makes a daring move—rather than fighting over the issue of whether the fetus is a person, Tribe boldly concedes the fact for purposes of argument, and then argues, “So what? It shouldn't lead us to restrict abortion anyway.”¹⁴

Tribe's argument relies heavily on the political or constitutional issue of whether someone can be *required* to act morally. But the analogy to the violinist is indeed powerful—but not in the way Tribe intended. What sort of moral obligation would that scenario impose upon the rest of society? If every year approximately a million lives were “terminated” because another person upon whom they were dependent found it too stressful to continue supporting them, would we be entitled—worse yet, obligated—to do nothing? Can we apply this logic to AIDS victims? If families quietly began “terminating” AIDS victims because they were too burdensome, and interfered with other family relationships, would we shake our heads and be content with voting larger subsidies for sterile needles and condoms? One suspects that Tribe would be the first to express moral outrage. Yet Tribe seems to have strangely little moral outrage for the “termination” of a million unborn children. Even if it were unusual for society to convert moral

12. On the one hand, the violinist would be a more fully realized human being, thus making the argument against “termination” more difficult; on the other hand, the image of being connected, presumably by some kind of tubes, to a Siamese twin, is more invasive of one's sense of privacy than the incubation of a fetus. Pregnant women can still enjoy their privacy, even if pregnancy is physically uncomfortable at times.

13. As an important bulwark against the argument that a woman's consent might justify the imposition of a duty to protect her fetus, Tribe views the pregnancy as a kind of accident, either because the woman did not choose to engage in sexual intercourse (because of rape or incest), or because she did not choose to become pregnant (pp. 132-34).

14. Tribe of course does not actually concede that the fetus is a person. Even in *Roe v. Wade*, 410 U.S. 113, 156-57 (1973) the Supreme Court recognized that if the fetus *were* a “person” within the language and meaning of the fourteenth amendment, then the fetus' right to life would be guaranteed.

obligations into legal duties,¹⁵ shouldn't we at least be clear as to the existence of the moral imperative?

Tribe's discussion of morality suffers from its failure to look beyond the mother-child relationship. If in fact the unborn child is a person, or something close to it, the relationships to be considered include those of the father, the community, and society and in general to that child. By arguing that the state cannot force the *mother* to be a "good Samaritan," and emphasizing the special burden that pregnancy places upon the mother, Tribe ignores the independent moral duty that society owes to preserve the child's life. If in fact the relevant relationships extend from unborn child to father as well as mother, and further to the society as a whole, then the burden of a crisis pregnancy cannot be placed on the woman alone, but rather must be carried by the society as a whole. But that is an argument for *extending* the moral obligation, not denying its existence.

2. *Legislative Policymaking.* Tribe also considers the related, but analytically distinct, question of the wisdom of statutory intervention into the woman's decision on abortion. Certainly one's view of the morality of abortion has a bearing upon the seriousness of the threat that is perceived by the woman's decision. Those who think abortion is murder are going to have considerably greater enthusiasm for regulation than those who think it a welcome solution to overpopulation. On the other hand, morality does not necessarily determine legislation. The debate on drug policy provides an analogy. Many who passionately oppose drug use on moral grounds nonetheless favor legalization, because in their view criminalization of drug use only causes users to support their habits by criminal means.

Tribe doesn't make the analogy, but he makes a similar argument that criminalizing, or even regulating abortion, will produce social grief without offsetting social benefit. Tribe reviews suggested regulations to reduce abortion, including requiring parental consent,¹⁶ insisting upon parental

15. Of course, it is not unheard of for society to convert a moral obligation into a legally enforceable duty. Filing income tax returns, paying child support, and registering for the military draft come to mind.

16. Pp. 198-99. Tribe's objection to this practice is that it could just as easily give the parent the power to order an abortion as it would be to forbid one. Tribe only suggests that this position "cannot plausibly be defended as part of a 'pro-life' compromise" (p. 199). But the fact that a proposal accomplishes only half of an advocate's objectives does not disqualify it as a compromise. If parental consent requirements would avoid, say, half of the abortions each year, that would be desirable even if it resulted in a handful of cases in

notification;¹⁷ waiting periods; limiting acceptable reasons for abortion; reducing abortion funding¹⁸ or access to clinics; or enforcing earlier cutoff dates.¹⁹ In each case Tribe finds them unwise, because they impose unacceptable burdens upon women without producing any substantial reduction in the number of abortions. He calls these alternatives "cruel compromises," because "rather than meaningfully protecting either life or choice, [restrictive laws] randomly frustrate both"²⁰

Instead, Tribe suggests that only women have the right to make the decision:

Women who make that choice to end a pregnancy ordinarily recognize the gravity of what they are doing. "Compromises" that pretend otherwise, that treat each woman as a stranger to her fetus and pit the two against one another, are lacking in human understanding and are not plausible moves toward a world in which people reach out to each other.²¹

3. *Constitutional Constraints.* Tribe believes that, once women are sufficiently organized, they will prevail in the legislative arena, with beneficial results for all concerned.²² However, to insure the right outcome

which the parents compelled their daughter to have an abortion.

17. Arguing that "there are some circumstances in which the consequences of the attempt [to notify] the parents would surely be devastating" (p. 202), Tribe falls back upon the anecdotal technique, with horror stories about children who tried home remedies, or who were punished by their parents. For example, there is Becky, *supra* note 8; and then there is the Idaho father, who reacted to the news that his daughter was pregnant with *his* child by shooting her (p. 203). Should that story be the paradigmatic case upon which social policy is constructed?

18. P. 206. Tribe describes this option as "perhaps the most peculiar of all the legislative compromises on the question of abortion." *Id.* Would it be peculiar to support the decriminalization of tobacco or cocaine use, but oppose government subsidies for them? Does it matter that rich people have greater access to tobacco or cocaine than poor people?

19. P. 208. As with the case of parental notification statutes, Tribe argues that, because they do not save all fetuses, such approaches make no sense when sought by abortion opponents (p. 209).

20. P. 208.

21. P. 211.

22.

[W]orking to win recognition of equal rights in the legislature, rather than have them protected by judicial pronouncement, may give women in American politics greater self-respect and greater knowledge of their own potential political power. That in turn may, more than anything before it, help advance the cause of equality, a cause that, in the long run, may do more than abortion

he is prepared to play his trump card—constitutional law. In his view, constitutional rights flow in one direction only—in favor of choice:

If someone thinks the Constitution should be amended to endow all fetuses with the status of persons, there may be no way to convince that individual that such an amendment would be morally wrong because it would subordinate women. But it is vital, morally vital, to see the force of the argument that an *amendment* to our Constitution would be required to achieve that result.²³

But it turns out that Tribe's constitutional analysis resembles a shell game. On the one hand, he carefully examines the text and history of the use of the term "person," concluding that the authors of the fourteenth amendment did not think of fetuses as persons.²⁴ On the other hand, Tribe enthusiastically supports the rewriting of the Constitution wherever—for whatever reason—an important right is omitted. Tribe quotes approvingly from Professor Charles Black:

If our constitutional law could permit such a thing to happen [a ban on contraceptives], then we might almost as well not have any law of constitutional limitations, partly because the thing is so outrageous in itself, and partly because a constitutional law inadequate to deal with such an outrage would be too feeble, in method and doctrine, to deal with a very great amount of equally outrageous material.²⁵

Those, like Robert Bork,²⁶ who prefer an "originalist" or "interpretivist" approach to the Constitution are viewed as "extremely conservative."²⁷ Tribe's continuing refrain is that the Constitution described by Bork and other "interpretivists" doesn't produce acceptable results. Tribe uses the example of the Supreme Court's decision in *Bolling v. Sharpe*.²⁸ In that case

restrictions ever could to advance a genuine reverence for life and a true respect for all humanity.

P. 196.

23. P. 128 (emphasis supplied).

24. P. 120. And as the previous quotation emphasizes, Tribe thinks we should be "taking the constitution"—Tribe's constitution—"seriously" (p. 128).

25. P. 94 (quoting Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 32 (1970)).

26. Even Bork's claim as an originalist has been recently challenged. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990).

27. See *supra* note 2.

28. 347 U.S. 497 (1954).

the court was asked to declare segregation in the Washington, D.C. school district unconstitutional. The court had just decided *Brown v. Board of Education*,²⁹ in which it had relied upon the fourteenth amendment to strike down segregation imposed by the states. The problem for the court in *Bolling* was that there was no constitutional prohibition against segregation by the *federal*, as opposed to the *state*, government.³⁰ Tribe acknowledges that “[s]trict adherence to a jurisprudence of original intent” would have found that the Supreme Court lacked the power to outlaw segregation in the District of Columbia. But of course “it would be unthinkable that the same Constitution would impose a lesser duty upon the Federal Government” than it did upon the states.³¹ In other words, so long as a practice is “outrageous” or “unthinkable,” then it is the moral duty of the Supreme Court to declare it unconstitutional, the text of the Constitution to the contrary notwithstanding.³²

It is at this point that Tribe’s attempt to find an alternative to the “clash of absolutes” becomes most disappointing. Tribe’s basic solution to the clash between pro-life and pro-choice positions is the adoption of the pro-choice position. But in the course of his advocacy Tribe offends not only those who

29. 347 U.S. 483 (1954).

30. The text of the fourteenth amendment provides “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Thus it does not address the issue of whether the federal government is similarly restricted.

31. P. 108.

32. Readers sympathetic with Tribe’s intentions may feel that he should be forgiven for what is apparently a noble aspiration. After all, they may say, it does no harm to provide extra protections for our rights by amplifying the constitution. Unfortunately, this reaction fails to recognize that sauce for the goose is sauce for the gander. If it is acceptable to “adapt” the Constitution to the changing times we live in, it is easy to remove rights by the same process. Just as privacy advocates may say that the Constitution as written in the 1790’s or 1860’s should be read in light of the “needs” of the 1990’s, the advocates of fewer rights for criminals can say, “Well, the fourth amendment could be read generously in the 1790’s. They didn’t have rampant crime. But now we do. So the fourth amendment must be read in light of modern circumstances, that is, much more narrowly.” Or, “Absolutism about free speech was fine in the days of newspapers. But you can’t let TV stations enjoy full first amendment protections because they’re too powerful.” If the reader finds this a paranoid fantasy, consider recent scholarship that argues for just such an “adaptation” of the first amendment. See Collins & Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087 (1990) and accompanying commentary.

think the angels are on the side of the foes of abortion, but also those who want to preserve the integrity of the legal system.

Particularly as a constitutional scholar, Tribe is in a position to remind both sides that law, even constitutional law, is made by men and women, not by philosopher kings and queens, and at times following the law will mean that a judge must allow a moral outrage to occur. This is the price we pay for living in a constitutional democracy rather than a theocracy. Judges who decide constitutional cases are faced with the same moral dilemma as that which faces a private citizen when compliance with the law offends her moral sensibilities.

Of course, one could argue that law should always take a backseat to morality, that by its nature the obligation to law is inferior to the dictates of one's conscience. Tribe's willingness to overlook the text of the Constitution, whether to eliminate segregation or back-alley abortions, brings to mind the famous exchange in *A Man for All Seasons*³³ between Thomas More, the paradigmatic lawyer, and his son-in-law Will Roper. Roper was appalled that More would refuse to arrest Richard Rich (who had just betrayed him and was later to perjure himself in order to secure More's execution), allowing him to escape.

More: And go he should, if he was the Devil himself, until he broke the law.

Roper: So now you'd give the Devil benefit of law!

More: Yes. What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that!

More: Oh? And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? This country's planted thick with laws from coast to coast—man's laws, not God's—and if you cut them down—and you're just the man to do it—d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.³⁴

Constitutional law, however majestic, is still man's law, not God's, but for that very reason moralists of whatever stripe should be reluctant to cut through it to get after the Devil.

33. R. BOLT, *A MAN FOR ALL SEASONS* (1960).

34. *Id.* at 37-38.

The abortion debate is eerily reminiscent of the debate over slavery before the Civil War. Then, as now, there were debates over whether slaves/fetuses were “persons” subject to constitutional protection. Then, as now, there were champions of the state’s/individual’s right to decide. Then, as now, there were questions as to whether one group could legally enforce its moral views on the other. Then, as now, there were charges that the groups professing concern for slaves/fetuses were in fact hypocritical, mouthing compassion but in fact unwilling to shoulder any real responsibility for their condition once they were ~~breed~~/born. Then, as now, the proponents of the existing system attempted to justify its cruelty by pointing out that the alternatives were often worse.

It is to be hoped that now, unlike then, the debate can be resolved in legislatures and courts, not on battlefields. But if the participants in the struggle—perhaps especially the pro-life forces—are in urgent need of a reminder that the law is a clumsy tool to promote moral virtue, Tribe is in no position to deliver the message. By continuing to urge the Supreme Court to ignore Constitutional text in favor of the justices’ own moral judgment (so long as it coincides with his own, of course), Tribe makes it easier for extremists of both stripes to claim that the justice of their own cause renders them immune from the law’s commands. If judges are not required to follow law when it conflicts with their sense of morality, why should the average citizen? If law is the means by which people of conflicting moral views live together in relative harmony, it must have some moral power. By undermining the law’s neutrality, Tribe has unfortunately prolonged the “clash of absolutes.”