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David F. Smolin

BOOK REVIEW ESSAY

WHY ABORTION RIGHTS ARE NOT JUSTIFIED BY REFERENCE TO GENDER EQUALITY: A RESPONSE TO PROFESSOR TRIBE

Abortion, The Clash of Absolutes. By Lawrence H. Tribe.* *W.W. Norton & Co.*, 1990. Pp. xvi, 270. $19.95.

DAVID M. SMOLIN**

Abortion, The Clash of Absolutes[1] ("*Abortion*") begins with an invitation to the reader to examine and understand both sides of the abortion debate.[2] Professor Tribe specifically disclaims any attempt to "prove" the correctness of a specific position; instead, he asks the reader to be open to reexamining the issue, in search of "common ground."[3] The book ends with a comment on how the two sides talk to one another.[4] Ostensibly, then, this is a book about dialogue, and an evenhanded examination of both sides of the debate.

Despite Professor Tribe's protestations, it is readily apparent that *Abortion* constitutes an extended argument, or brief, addressed primarily to the general public, supporting the abortion rights position. *Abortion* markets to the general reader abortion rights arguments that have been prevalent in academia for several decades.

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* Tyler Professor of Constitutional Law, Harvard Law School.

** Associate Professor of Law, Cumberland Law School, Samford University. The author wishes to thank Scott Houser, William Ross, Basile Uddo, and George Wright for their review of and comments on a prior draft of this Article. The author also wishes to thank Lynne Michele Bradford, Les Ennis, Joe Kemp, Todd McLeroy, and Danielle Marquis for their research assistance.

1. L. TRIBE, ABORTION, THE CLASH OF ABSOLUTES (1990).
2. *Id.* at 3-9.
3. *Id.* at 8.
4. *Id.* at 238-42.

These academic arguments have suggested that abortion rights are proper and necessary regardless of the moral status of the fetus, because carrying an unwanted fetus to term profoundly burdens a woman's autonomy and equality.[5] Professor Tribe is certainly entitled to explain these legal theories to the general public. One wishes, however, that he had refrained from his declaration of nonadvocacy and his promise of an evenhanded critique of both sides.

This book review will respond to *Abortion*'s plea for dialogue by critiquing critical portions of selected chapters.[6] The primary purpose of this critique is to respond to the argument that broad abortion rights are necessary to women's equality. In this sense, this book review is a response to the growing academic literature supporting abortion rights through a rationale combining autonomy and gender equality concerns. *Abortion* is a publication event primarily because it lends further intellectual respectability to these views. The time is ripe for a considered response.

A second purpose of this book review is to demonstrate *Abortion*'s extremely one-sided presentation of the issue. It is not merely that Tribe defends a specific position; more to the point, he defends his position with errors, omissions, and distortions, many of which the general reader would inevitably miss. *Abortion*, in short, fails as legal scholarship, or even as popularized legal scholarship; ideological commitment overwhelms scholarship.

Ideological commitment and scholarship are not necessarily incompatible. It can be ennobling for a professor to profess, and defend, a particular view. It certainly can be argued that value-free scholarship is a false and impossible ideal; better to make explicit our commitments and presuppositions, than to hide behind the title of scholar. But scholarship nonetheless, if it is to bear that name, must meet certain criteria. Scholarship should take account of contrary views and inconvenient facts; argue in a reasoned manner; strive for accuracy and precision. Certainly, appeals to emotion cannot and should not be excluded, lest we pretend to be something other than human. Nonetheless, those who appeal to emotions by

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5. *See, e.g.*, C. MACKINNON, FEMINISM UNMODIFIED 93-102 (1987); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1352-58 (2d ed. 1988)[hereinafter AMERICAN CONSTITUTIONAL LAW]; Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569 (1979); Sherry, *Woman's Virtue*, 63 TULANE LAW J. 1591 (1989); Thomson, *A Defense of Abortion*, 1 J. PHIL. & PUB. AFF. 47 (1971). Cass Sunstein has spoken of "the mounting academic consensus that *Roe v. Wade* involved issues of sex discrimination as well as privacy. . . ." Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1175 (1988).

6. Professor Tribe's argument for abortion rights is intricately developed throughout *Abortion*; therefore the critiques of specific chapters by necessity will also refer to other portions of the book.

evoking difficult human circumstances must seek to convey a wide range of relevant human experiences, and must not shirk from those whose intense experiences appear to cast our views in a harsh light. And finally, appeals of any kind, to either emotion, human circumstance, or reason, must give way to acknowledgments of the core commitments that serve as responses to our experience. In this way, scholarship can, if nothing else, help us to understand ourselves and one another, through an understanding of those core commitments. Hopefully, the following analysis of *Abortion* will further this process of understanding and meet the high demands and standards of scholarship that I have articulated.

I. Critique of Chapter One: "Approaching Abortion Anew"

Tribe urges us to look beyond the namelessness of the real women and fetuses involved in abortion, to the human reality on each side.[7] We are urged to "give voice" to this human reality.[8] Tribe tells us something of the story of the plaintiff in *Roe v. Wade*, Norma McCorvey, the plaintiff in *Doe v. Bolton*, Sandra Race Cano, and the fetus in *Doe*, Ms. Cano's daughter, Melissa Able.[9] Unfortunately, Tribe significantly distorts one of the few human stories he chooses to tell.

Tribe states that Ms. Cano's daughter "would have been aborted if [Cano]. . .had been able to obtain in Georgia the abortion she sought there. Because abortion was so heavily restricted, Cano. . .ended up giving birth to a daughter. . . ."[10] The purpose of telling this story is apparently to recount the irony that Cano is now active in the pro-life movement, while her daughter has publicly avowed a pro-abortion rights position.[11] Unfortunately, Tribe fails to tell the reader that Cano now claims that she never wanted an abortion, and was in fact coerced into being a plaintiff in *Doe v. Bolton* by her attorney. Moreover, even though her attorney denies any coercion, the record is clear that arrangements for a legal abortion were made for Cano, and yet she did not go through with the abortion.[12] Although Tribe may not believe Cano's version, he owes it to her, and to the reader, to acknowledge it, particularly when he is urging us to "give voice" and listen.

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7. L. Tribe, *supra* note 1, at 5.
8. *Id.* at 6.
9. *Id.* at 4-6.
10. *Id.* at 5.
11. *Id.* at 5-6.
12. *See* Treadwell, *Abortion Plaintiffs Now on Opposite Sides*, L.A. Times, June 25, 1989, at C 10; Newman, *Daughter of Woman in Abortion Case Takes a Pro-Choice Stand*, L.A. Times, Nov. 11, 1989, at B1, col. 3; Curridan, *Doe v. Bolton* 75 A.B.A. J. 26 (July 1989).

The failure to fairly recount Cano's story is illustrative of Tribe's selective storytelling throughout *Abortion.* The only abortion experiences Tribe mentions or recounts relate to negative consequences from restrictive abortion laws. For example, he recounts the story of Becky, a "blond, blue-eyed former cheerleader" whose death was linked to Indiana's parental consent law.[13] (Tribe's gratuitous description of Becky invites charges of racism or sexism; perhaps the implied message is that normal, attractive, white, middle-class American teenagers can be victims of abortion laws.) Tribe never recounts, or even refers to, the equally emotional stories of women who believe themselves victims of *legal* abortion. We are not told, for example, the contrasting story of Gaylene, who at fourteen felt pressured by her school counselor and Planned Parenthood clinic to procure an abortion without her parent's knowledge or consent. According to Gaylene, this abortion was the cause of an attempted suicide over twelve years later.[14]

Perhaps the parental consent laws Tribe condemns could have saved Gaylene from undue pressure from her counselor, and from much emotional pain. We cannot evaluate parental consent laws by listening to their unintended victims, like Becky, while silencing those who suffered from the absence of such laws.

Apparently, Tribe is unaware of the extensive literature recounting women's experience of legal abortion, gathered by both pro-abortion rights and pro-life advocates.[15] From the pro-life perspective, this literature suggests that there is no true clash between the interests of the woman and of the fetus, because abortion harms both mother and child. Tribe is searching for a way out of the "no-win battle that mercilessly pits women against their unborn children. . . ."[16] He never seems to realize that it is abortion itself that creates this "merciless" conflict, and that the legalization of abortion may aggravate, rather than alleviate, the human suffering this conflict creates for women. It is certainly true that some women suf-

13. L. TRIBE, *supra* note 1, at 203.

14. D. REARDON, ABORTED WOMEN SILENT NO MORE 36-40 (1987). Gaylene's claim that she felt pressured to choose abortion is given credence by Jacqueline Kasun's description of the aggressive promotion of abortion present in some adolescent pregnancy counseling programs. *See* J. KASUN, THE WAR AGAINST POPULATION 145-46 (1988).

15. D. REARDON, *supra* note 14; THE BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, THE NEW OUR BODIES, OURSELVES 291-316 (1984) (hereinafter THE NEW OUR BODIES, OURSELVES); L. FRANCKE, THE AMBIVALENCE OF ABORTION (1978); M. ZIMMERMAN, PASSAGE THROUGH ABORTION (1977). Reardon's book is written from a pro-life perspective; OUR BODIES, OURSELVES and Francke's book overtly favor abortion rights. Another important resource written from a pro-abortion rights perspective is Magda Denes' study of an abortion hospital. The book is most useful for its insight into the staff and operations of an abortion hospital but also contains interviews with abortion patients. *See* M. DENES, IN NECESSITY AND SORROW (1976).

16. L. TRIBE, *supra* note 1, at 6.

fered when abortion was illegal. In order to decide whether legalizing abortion is an improvement, *even for women*, we must determine whether the suffering of women has been increased or decreased. Tribe appears oblivious to this question, possibly because he is so blinded by the slogan "safe, legal abortion" that he is unaware of the evidence that "safe, legal abortion" has physical and emotional hazards of its own.

Tribe's one-sided recounting of abortion experiences is a symptom of his assumption that abortion rights benefit women; this assumption, which pervades *Abortion*, will be further analyzed below.[17]

II. Critique of Chapter Three: "Two Centuries of American Abortion Law"

The premise of Professor Tribe's historical chapter is that the absolutes of the current abortion debate—life and liberty—are "socially constructed" and "arise out of particular social contexts, problems, and concerns that change as society changes."[18] His embrace of social contingency means less than may at first appear. He later rejects the view of Professor Frances Olsen that the value of fetal life is simply culturally created, or merely a "social attribute that arises from the totality of social relations regarding reproduction."[19] Tribe implies that the argument proves too much: societies have denied or denigrated the value of women, blacks, some infants, and the "severely deformed." We must be able to ask whether a valuation is right, Tribe insists, even if we "may have no answer."[20]

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17. This book review essay will cite and quote the experiences of aborting women both to balance Tribe's one-sided account, and also to emphasize the distorting effect of Tribe's abstractions. Those interested in a fuller account of abortion experiences should read the cited sources. This review will not attempt to resolve the current dispute over abortion morbidity or mortality rates, although such a resolution clearly would be relevant to a full discussion of the impact of legal abortion upon women. It is enough for present purposes to note that Tribe's assumption that legal abortion is extremely safe and needs little regulation is disputed. L. Tribe, *supra* note 1, at 207. *See, e.g.*, Amicus Curiae Brief of Feminists for Life of America, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (No. 88-605) (documenting underreporting of maternal abortion deaths and claiming that legal abortion endangers the life and health of women); Sontag, *An Abortion*, Miami Herald, Sept. 17, 1989, (Tropic), at 8 (documenting substandard and unsafe medical practice at Florida abortion facility); *The Abortion Profiteers* (Special Reprint), Chicago Sun-Times 1978 (documenting substandard and unsafe medical practices at certain Chicago abortion facilities); Hilgers & Moran, *Abortion Related Maternal Mortality: An In-Depth Analysis*, in New Perspectives on Human Abortion 69-91 (1981) and Lembrych, *Fertility Problems Following Aborted First Pregnancy* in New Perspectives on Human Abortion 128-50 (1981) (discussing abortion mortality and morbidity); D. Reardon, *supra* note 14, at 89-114 (discussing physical risks of abortion).

18. L. Tribe, *supra* note 1, at 27.

19. *Id.* at 119.

20. *Id.* at 119-20.

Tribe's rejection of pure social contingency at first appears to render his historical chapter irrelevant. Surely any failure of our ancestors to be concerned with either the freedom or equality of women, or the lives of the unborn, does not bind us. History presents from one perspective a progressive march of equality and freedom; the question at stake is the place of abortion rights for women, or abortion restrictions for the unborn, within the scheme of that progression. This argument is particularly relevant to the unborn because we know so much more about them than we did two hundred years ago. If the public of the nineteenth century did not restrict abortion to save babies maybe it is because they did not view ultrasound or color photographs of the unborn, and were otherwise poorly informed about fetal development. Indeed, the female ovum, and thus the basic principles of human reproduction, were not even discovered by physicians until the nineteenth century.[21] Under these circumstances, it would not be surprising if abortion was viewed somewhat differently.

However, Tribe's historical account of abortion restrictions in terms of power relationships is not intended as an irrelevant aside. Its purpose, as Tribe informs us, is that "if we recognize the nature of our beliefs, we may ultimately be better able to discern the social agendas implicit in the positions taken on both sides of the abortion question."[22] On its face, of course, his comment is nonsensical. If social meanings are contingent, and change with time, then the purported fact that nineteenth century abortion restrictions were intended to enforce traditional sex roles, for example, would initially tell us nothing about current motivations to restrict abortion. Social contingency, after all, implies that abortion means something different today than in the past. Nonetheless, Tribe's purpose, in the context of the rest of the book, is clear: his historical chapter undergirds his later questioning of pro-life motivations. Tribe apparently believes that pro-life activists are really more concerned about controlling women than saving babies.[23]

Tribe's analysis of pro-life attitudes ultimately leads him to make an apparently strange argument: that pro-lifers who realize that their true or predominate motivation is to restrict women should cease working to criminalize abortion.[24] The argument is

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21. *See* Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359, 403-04 (1979).

22. L. TRIBE, *supra* note 1, at 27.

23. *Id.* at 115, 229-42.

24. *Id.* at 241. Tribe states:

> To the pro-life advocate, it may become clear in the end that at a deep level, 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 or of nature. If this is so, then opposition to a right to choose seeks to restrict the liberty of

completely unprincipled. Surely purity of motivation is not required for social action, so long as the end sought is proper. Nobody has completely pure motivations, even for laudable conduct. The absurdity of the argument is illustrated by attempts to apply it. Should women who consider men to be morally inferior cease efforts for enforcement of rape laws? If we discovered that enforcement of infanticide laws was primarily motivated by a desire to maintain traditional gender or parenting roles, rather than "true" concern for neonatal life, would we urge abolition of such laws?

It would appear that the true audience for Tribe's motivational attack on the pro-life community is the pro-abortion rights community, who already, as Tribe notes, tend to hold pro-lifers in contempt.[25] Tribe criticizes this contempt for pro-lifers,[26] while simultaneously reflecting and reinforcing it. Tribe urges dialogue, and yet gives the pro-abortion rights community reasons to ignore the pro-life community.

In any event, Tribe's historical survey is itself deeply flawed. There exists a lively scholarly debate regarding the history of American abortion. The points of contention include the prevalency of abortion from the colonial period to *Roe*;[27] abortion methods, and especially their safety for women, prior to the modern era of antibiotics and surgery;[28] the content and existence of common law abortion restrictions;[29] the timing and motivation of nineteenth century abortion law.[30] Two competing accounts may be labeled the "abor-

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> unwilling women in the name of something less than the 'absolute' of the protection of human life. And if this is the case, then even the pro-life advocate may conclude that the objection to abortion rights ought to yield, as a matter of morality, to the claim of the woman to her liberty and equality. To conscript a woman to save a *life* might be one thing. To conscript her to save a *way* of life, one in which she is relegated to a second-class role, is another thing entirely.

Id.

25. *Id.* at 238-40.

26. *Id.*

27. *Cf.* Amicus Curiae Brief of 281 American Historians, in Support of Appellees, at 5-6, 8, Webster v. Reproductive Health Serv., 109 S.Ct. 3040 (1989) (No. 88-605) [hereinafter Appellee's Historical Brief]; J. MOHR, ABORTION IN AMERICA 16, 50 (1978); Note, *Survey of Abortion Law*, 1 ARIZ. ST. L.J. 67, 97 n.144, 105 (1980); M. OLASKY, THE PRESS AND ABORTION, 1838-1988 3-4 (1988); Dellapenna, *supra* note 21, at 374-76, 394-95; D. REARDON, *supra* note 14, at 287-91; Syska, Hilgers, & O'Hare, *An Objective Model for Estimating Criminal Abortions and Its Implications for Public Policy*, in NEW PERSPECTIVES ON HUMAN ABORTION, *supra* note 17.

28. *Cf.* J. MOHR, *supra* note 27, at 6-19; Dellapenna, Amicus Curiae Brief of the Association for Public Justice and the Value of Life Committee, in Support of Appellants, at 10-16, 20-22, in Webster v. Reproductive Health Serv., 109 S.Ct. 3040 (1989)[hereinafter cited as Dellapenna Historical Brief]; Dellapenna, *supra* note 21, at 371-78, 394-95, 412.

29. *Cf.* Appellee's Historical Brief, *supra* note 27, at 4-5; Dellapenna Historical Brief, *supra* note 28, at 6-11, 17-19; Dellapenna, *supra* note 21, at 366-89.

30. *Cf.* J. MOHR, *supra* note 27; Appellee's Historical Brief, *supra* note 27, at 13-

tion rights history" and the "pro-life history" and simplistically summarized as follows:

A. Abortion Rights History

Abortion (and particularly pre-quickening abortion) was common, morally uncontroversial, and virtually unrestricted until the American Medical Association launched a successful campaign in the mid-nineteenth century to enact abortion restrictions. These restrictions were primarily motivated by the desire of the medical profession for increased power, concern for maternal safety, desire to maximize reproduction among white Protestants descended from Northern Europeans, and traditional gender stereotypes about the role of women. Protecting prenatal life was a stated but secondary motivation for these statutes.[31]

B. Pro-Life History

Abortion was rare during the colonial period, largely due to the lack of an effective abortion method that was not a severe threat to the woman's life and health. The primary threat to unwanted young life was infanticide, and therefore the law was concerned primarily with infanticide, and only secondarily with abortion. In addition, a lack of knowledge concerning the process of human reproduction, and difficulties proving the existence of a live unborn child prior to the abortion, led the common law to criminalize abortion only after quickening. Nonetheless, abortion was recognized as an evil, and ordinances prohibiting midwives from providing abortions apparently applied throughout pregnancy. During the nineteenth century the numbers of abortions increased somewhat, as did medical knowledge of human reproduction. Medicine's discovery of the human female ovum and of human conception led to a discarding of the quickening standard and the enactment of abortion prohibitions. These nineteenth-century statutes were motivated by a desire to protect both unborn children and women.[32]

The Supreme Court in *Roe v. Wade* repeatedly cited, without explicit endorsement, an abortion rights history developed by Professor Cyril Means.[33] More recently, pro-abortion rights advocates

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21; Dellapenna Historical Brief, *supra* note 28, at 19-22; Dellapenna, *supra* 21, at 389-407.

31. *See* Appellee's Historical Brief, *supra* note 27; J. MOHR, *supra* note 27.

32. *See* Dellapenna, *supra* note 21; Dellapenna Historical Brief, *supra* note 28; M. OLASKY, *supra* note 27; Horan & Marzen, *Abortion and Midwifery: A Footnote in Legal History*, in NEW PERSPECTIVES ON HUMAN ABORTION, *supra* note 17, at 199.

33. *See* Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411

have relied on James C. Mohr's history of American abortion policy.[34] The pro-life account has been summarized, both in a law review article and an amicus brief in *Webster v. Reproductive Health Services*, by Professor Joseph Dellapenna.[35] The dispute over these two versions is well-known. Indeed, the dispute surfaced during *Webster*'s oral arguments. Chief Justice Rehnquist and Justice Scalia criticized Mr. Frank Susman for his argument that the abortion right was a "deeply rooted liberty." Justice Scalia specifically cited Dellapenna's brief.[36]

The reader of *Abortion* unfortunately is left completely unaware of both the scholarly dispute, and the pro-life historical account. Tribe simply recounts one version of the abortion rights history,[37] announcing as accepted fact its most contentious conclusions: in particular that abortion was commonplace in both the late eighteenth century and the nineteenth century;[38] that the quickening distinction was "testimony to the strength of the view that a woman should be able to end an unwanted, unconfirmed early pregnancy;"[39] and that the nineteenth century restrictions were "designed more to protect the medical profession than to safeguard *either* women *or* the unborn."[40] It is nothing short of irresponsible for Tribe to trumpet these views to the general reader without even acknowledging differing scholarly views, particularly in a book that claims to be evenhanded.

III. Critique of Chapter Five: "Finding Abortion Rights in the Constitution"

A. Autonomy and Privacy

Tribe's constitution is a simple reflection of contemporary concepts of individual autonomy. He interprets the text of the Constitution and Supreme Court case law within the framework of this commitment. Tribe, however, merely assumes, rather than demon-

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(1968); Means, *The Phoenix of Abortional Freedom: Is a Penumbral Right of Ninth-Amendment about to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common Law Liberty?*, 17 N.Y.L.F. 335 (1971). The majority opinion in *Roe* cited one or both of Means' articles four times. Roe v. Wade, 410 U.S. 113, 132 n.21, 134 n.22, 135 n.26, 151 n.47 (1973).

34. *See* Appellee's Historical Brief, *supra* note 27. The abortion rights historian's brief in *Webster* repeatedly cites and quotes Professor Mohr's work.

35. *See* Dellapenna, *supra* note 21; Dellapenna Historical Brief, *supra* note 28.

36. *See Transcript of Capital Arguments Before High Court on Abortion Case: Argument by Frank Susman, Lawyer for Missouri Abortion Clinics*, N.Y. Times, Apr. 27, 1989, at 15.

37. *See* L. Tribe, *supra* note 1, at 27-41.

38. *Id.* at 28-29.

39. *Id.* at 29.

40. *Id.* at 34.

strates, that this interpretive principle of autonomy is actually the dominant American tradition, either now or in the past. His failure to attempt this demonstration renders his argument purposeless. Anyone can start with a presupposition, apply it to the constitutional text, twist some case law into apparent support, and arrive at one's intended result. The interesting question, which Tribe never engages, is why one should adopt a particular presupposition.

Thus, Tribe declares that "the privacy cases recognize that the liberty clause of the Fourteenth Amendment guarantees each of us the right not to have the state shackle us with self-defining decisions."[41] In penning this language, Tribe appears to have forgotten that he lost *Bowers v. Hardwick*.[42] His language, so reminiscent of Justice Blackmun's dissent in *Hardwick*,[43] simply cannot be squared with the result in *Hardwick*. Surely the decision to engage in consensual sodomy is self-defining. Under the autonomy presupposition, so eloquently described by Justice Blackmun, individuals define themselves through their intimate associations, and therefore possess a fundamental right to engage in such activities even if the majority consider them wrong or repugnant.[44]

Tribe distorts the privacy case law in his attempt to explain it through the autonomy rubric. For example, he states that the contraception cases protect the fundamental right "to engage in sexual intercourse without having children."[45] This characterization of course leads nicely to the abortion right: since contraception fails, or is not used, then the abortion right becomes a necessary component of the right to engage in sexual intercourse without having children. This characterization of the contraception right, however, has little or no support in the current case law.[46] First, there is no fundamen-

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41. *Id.* at 102.

42. 478 U.S. 186 (1986). Professor Tribe "argued the cause for respondent Hardwick." *Id.* at 187.

43. *See* 478 U.S. at 204-06.

44. *Id.*

45. L. TRIBE, *supra* note 1, at 94, 103.

46. The only possible support for Tribe's characterization of the contraception cases is found in Justice Brennan's well-known statement in Eisenstadt v. Baird, 405 U.S. 438, 453 (1972): "if the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." This broad characterization of the privacy right certainly appears to suggest the inclusion of the abortion right within the privacy right; the Court, moreover, had *Roe* before it when Brennan authored these words. Justice Brennan's characterization of the privacy right was dicta; although his opinion was a majority opinion it represented the views of only four Justices. It implies applications—such as the right of heterosexual unmarried intimacy—that the Court has never embraced. (Surely fornication statutes infringe the freedom of an unmarried individual to conceive a child, even if their enforcement is lax and ineffective.) Yet even Justice Brennan's characterization of the privacy right is narrow compared with Tribe's formulation: Justice Brennan speaks in terms of freedom from governmental intrusion, while

tal right under current law for an unmarried heterosexual couple to engage in sexual activity; Tribe's formulation at least tends to suggest that such a right exists.[47] Second, the Justices did not purport in the contraception cases to somehow guarantee to individuals a certain result, i.e., of childlessness. Rather, the contraception cases recognized the right to take a certain action, to use contraceptives, which may or may not lead to a desired result. The notion that government can guarantee certain results, such as childless sexuality, is of course endemic to American liberalism; it has generally, however, not yet been embraced by the Court.

Tribe correctly notes that the existence and content of unenumerated rights are generally determined by examining the history and traditions of our people.[48] He appears to assume that our choices of traditions are rather limited: either liberty means autonomy, or else the Constitution permits forced abortions, forced sterilizations, antimiscegenation laws, and marital contraception prohibitions.[49] Tribe's argument thus embraces the familiar scare tactic of pro-abortion rights advocates. Such scare tactics largely ignore the existence of a competing theory of privacy: one based on respect for the traditional family. Surely there exists in our country a tradition which distinguishes between marital and nonmarital sexuality; between heterosexuality and homosexuality; between carrying a pregnancy to term and ending a pregnancy through abortion; and between educating one's child and killing one's child. Surely there exists a tradition that considers, as *Griswold v. Connecticut*'s rhetoric acknowledged,[50] that the family is a more basic institution than government, and therefore deserves protection from government. Under this tradition, of course, actions traditionally viewed as within the legitimate scope of family activity—such as marital heterosexual intercourse, birth, and rearing and educating one's chil-

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Tribe speaks of government guaranteeing a certain result: childless sexuality. Professor Tribe's broad formulation of the meaning of the contraception cases is simply not an accurate reflection of what the Justices have taken those cases to mean.

47. The majority of Justices have refused to characterize the contraception cases as including a right for the unmarried to engage in sexual intimacy. *See* Carey v. Population Services International, 431 U.S. 678, 688 n.5, 694 n.17 (1977); *see also id.* at 718 n.2 (Rehnquist, J., dissenting).

48. L. TRIBE, *supra* note 1, at 92.

49. *See id.* at 95, 101, 111-12.

50. 381 U.S. 479, 486 (1965). The Court stated:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id.

dren—are constitutionally protected, while actions viewed as destructive of or outside of the family—such as fornication, adultery, sodomy, abortion, and infanticide—are viewed as constitutionally unprotected. This tradition, moreover, includes a substantive definition of "family." Although one can debate the exact scope of the family, the mere existence of cohabitation or of a sexual or emotional relationship does not constitute a family. Tribe would clearly reject this latter theory of privacy. Unfortunately, he never bothers to tell us why.

To the extent that Tribe attempts to imply that his autonomy theory of liberty is historically supportable, his argument is frivolous. No historian has yet argued that those who framed either the Constitution, Bill of Rights, or the fourteenth amendment, envisaged liberty to be equivalent to Tribe's and Blackmun's notions of radical individual autonomy. This sort of radical autonomy was apparently foreign to predominate American eighteenth and nineteenth century conceptions of either "liberty" or "equality."[51] In this sense, Tribe's extensive argument that rights must be broadly characterized when evaluating their historical support[52] is irrelevant; viewing the abortion right most abstractly as a right to make self-defining decisions cannot save it, because the right to make self-defining decisions is a principle foreign to the framers.

Tribe suggests that the due process clause embodies a theory of "natural rights."[53] Regardless of whether he is right about this assertion, it is clear that the predominate theory of natural rights that is deeply rooted in Anglo-American law and American tradition is based on substantive moral presuppositions. Neither sodomy nor abortion are regarded as within natural right not only because they are possibly "harmful" but more profoundly because they are wrong. By contrast, Tribe's contrary view of individual autonomy apparently leaves individuals free to determine their own morality and forms of association, at least so long as such decisions are "self-defining." It is clear that these two visions of our fundamental compact are mutually exclusive. It is also clear that Tribe's autonomy vision is only an "interpretation" of the Constitution in a very loose sense. Certainly one can interpret liberty to mean radical autonomy; one may, however, also interpret liberty to mean life under a totalitarian tyrant as well, if one so chooses. Both choices may be equally distant from anything envisioned by our ancestors. If five Justices on the Court may apply a foreign interpretive principle to "liberty" and "equality" than they surely possess the power to strangely

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51. *See generally* J. REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION (1988); M. KAMMEN, SPHERES OF LIBERTY (1986).

52. L. TRIBE, *supra* note 1, at 100-01.

53. *Id.* at 84.

transform our fundamental compact. It is in this sense—the power to radically alter the fundamental compact through introduction of a foreign interpretive ideology—that *Roe* can properly be viewed as an illegitimate usurpation of power.

Tribe might argue that the historically based moral tradition invoked herein is hopelessly at odds with our contemporary society. Clearly many elite groups in American society embrace *Roe* and the autonomy principle. Thus, Tribe acknowledges the "uncomfortable truth" that abortion rights are disproportionately supported by "various privileged elites."[54] Tribe also relies on elite support of *Roe* to legitimize it: in particular when he cites the American Bar Association's official support of abortion rights and the pro-abortion rights brief submitted on behalf of 885 law professors.[55] But *Roe* has produced increased resistance with the passage of time. *Roe* is the lightning rod for the conflict between the autonomy principle and the morality principle; the embracing by elites of autonomy should not obscure the widespread support in America for the more traditional view.[56] Tribe is correct when he states that the question of which principles to use in interpreting liberty "is a question about the meaning of America."[57] Having correctly articulated the question, it is disappointing that he assumes rather than defends his choice of individual autonomy as the principle defining the "meaning of America." Tribe also fails to explain why it is legitimate for privileged elites to infuse the Constitution with an ideology that is inimical both to the generations that framed the Constitution and less privileged contemporary groups.

Tribe's treatment of societal change and the Constitution is ambiguous. First, he states:

> The 'right to abortion' was first *announced*, it's true, in *Roe v. Wade*. But as we have seen, the 'right to privacy,' whatever its outer bounds, was suggested as early as 1923 in the case of *Meyer v. Nebraska*. *Roe* was simply the first case in which the general question of state regulation of abortion was squarely considered by the Supreme Court. To argue that for this reason, the Constitution does not protect the right to abortion, or that it did not do so until January 22, 1973, is no better than to argue that it does not protect the 'right to contribute money to a political campaign.' Although that right was not *announced* until the Supreme Court's 1976 decision in *Buckley v. Valeo*, it is beyond doubt that this right is, and has long been, a right pro-

54. *Id.* at 238.

55. *Id.* at 82. The American Bar Association recently abandoned its pro-abortion rights position and adopted a policy of neutrality.

56. *See* B. BERGER & P. BERGER, THE WAR OVER THE FAMILY 23-39 (1983)(describing contemporary conflict over family between neo-traditionalism of business and working classes and critical or professional stance of the "new" or knowledge class).

57. L. TRIBE, *supra* note 1, at 91.

> tected by the free speech guarantee of the First Amendment. For that matter, the Supreme Court has never had occasion to declare that young lovers have a fundamental constitutional right to embrace one another lustily as they dance the night away. But that right, too, is there waiting to be proclaimed against any state or locality so prudish as to insist that the young couple conduct themselves with greater decorum.[58]

Apparently, Tribe intends us to believe that, like the right in *Buckley*, abortion rights were always recognized to be in the Constitution; the only apparent problem was that no one bothered to sue. If only an attorney had brought suit in 1870, or 1900, or 1950, the abortion right would have been openly declared. Does Tribe really believe his own rhetoric? Apparently not, because a mere two pages later he declares: "The Constitution is, and must be, a living document, not a history book," while declaring irrelevant the fact that abortion rights clearly were not foreseen or intended by the framers of the fourteenth amendment.[59]

Tribe's autonomy presupposition does not prevent him from invoking the connectedness of mother and unborn child in his defense of abortion rights.[60] Thus, he declares that the fetus "is not a lodger or prisoner or guest, nor is its mother a mere home or incubator. The fetus is, after all, her 'flesh and blood.' "[61] Tribe's characterization is ironic or inappropriate in several senses. First, his "flesh and blood" characterization contrasts noticeably with his later adoption of Judith Jarvis Thomson's attached violinist hypothetical, in which mother and fetus are compared to adult strangers whose circulatory systems have been artificially connected.[62] Second, Tribe's connectedness characterization is used to suggest that we should trust women with the fate of their own "flesh and blood" without attempting legal intervention.[63] The argument initially appears silly: we trust parents with their "flesh and blood" generally, by entrusting infants to parents, but the law still forbids infanticide and child abuse. Third, it is ironic when those committed to autonomy speak of trust or connectedness because they have destroyed the obligations that make them meaningful, at least from the viewpoint of

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58. *Id.* at 99. Tribe's presumption regarding the right of young lovers to dance appears to be at least partially erroneous. *See* City of Dallas v. Stranglin, 109 S. Ct. 1591 (1989)(city ordinance restricting admission to certain dance halls to persons between 14 and 18 years old held constitutional; right to associate through dance is not constitutionally protected); Clayton v. Place, 884 F.2d 376 (8th Cir. 1989)(school district policy of prohibiting dance in public schools upheld).

59. L. TRIBE, *supra* note 1, at 101.

60. *Id.* at 102.

61. *Id.*

62. *See infra* notes 93-107 and accompanying text for analysis of Tribe's use of Thomson's hypothetical.

63. L. TRIBE, *supra* note 1, at 102.

traditional family relations. Abortion rights are a type of disassociation right. Abortion itself constitutes a forceful separation of mother and child. Under the regime of autonomy we are supposed to view disassociation rights as protective of rich associations.[64] Under the regime of autonomy we protect associations not because they are good but because they "contribute to the happiness of individuals" and are necessary to the process of self-definition.[65] From a more traditional perspective this constitutes an impoverished view of human relatedness, a reduction of the human family, and of each individual family, to a collection of self-interested individuals. The conflict is thus between two traditions of human relations: an older tradition in which obligations enrich relationships, and the newer autonomy tradition in which legal obligations demean persons and diminish relationships.

Roe, of course, presents difficulties even within an autonomy framework. Shouldn't the autonomy of the fetus, who presumably would prefer life, be protected? Tribe reflects this tension when he concedes that a " 'right to kill a fetus' wouldn't be fundamental by anyone's definition."[66] He therefore finds it necessary to separate the right to kill a fetus from the right not to remain pregnant; *Roe*, he suggests, probably supports only the latter. The separation is difficult because, as Tribe concedes, by definition it is impossible to perform a previability abortion "without killing the fetus from which the woman is separated."[67] Yet, he claims this situation is not "inherent in nature:" we might someday be able to save the fetus through an artificial womb or transfer to another woman.

Tribe's separation of abortion from killing is consistent with his analysis of the abortion right. Thus, he argues that it is the physiological bonding process that occurs during pregnancy that alters the woman's identity to that of mother. This explanation allows Tribe to argue against adoption as a sufficient option. Adoption is cruel and difficult because of the bonding that has occurred; it is too late, because the woman's self-definition has already been altered. This characterization of motherhood also allows Tribe to ascribe to women a "permissible" motivation: they are not exercising a right to

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64. *See* Bowers v. Hardwick, 478 U.S. 186, 205 (1986)(Blackmun, J., dissenting)(citing Karst, *The Freedom of Intimate Associations*, 89 YALE L.J. 624, 637 (1980)). Professor Karst thus explained, on the page cited by Justice Blackmun, that "[i]t is the *choice* to form and maintain an intimate association that permits full realization of the associational values we cherish most," and that choice necessarily includes the "freedom to reject or terminate an intimate association." *See* Karst, *supra*, at 637 (emphasis added). Karst thus argued that the right to obtain a divorce is essential to the value of marriage. *See id.* at 637-38.

65. *See* Bowers, 478 U.S. at 205 (Blackmun, J. dissenting).

66. L. TRIBE, *supra* note 1, at 97.

67. *Id.* at 98.

destroy the fetus in order to prevent its continued existence, but rather are choosing to avoid an identity-altering experience.[68]

Tribe's account of the abortion right has no connection with the concrete reality of abortion, either for women or unborn children. It is technically correct that *after viability or after birth* the law currently distinguishes between a right to kill and a right to abort. Thus, states probably may require less destructive abortion techniques for postviability abortions, and may prohibit killing the live product of a "failed" abortion.[69] For purposes of a previable fetus within her mother, however, the right to abort is necessarily and in practice the right to kill. Artificial wombs or womb transfer capabilities will not change the deadly nature of previability abortion; rather, they will render every fetus "viable." The speculative possibility of such technology in future generations is surely not the relevant context for evaluating the abortion right of today. The relevant context for the women and fetuses of today is that less than 1% of all abortions are performed after viability, few fetuses survive even postviability abortions, and previability abortion necessarily involves the death of the fetus. In most abortions the fetus is forcibly dismembered and removed from the womb; in other abortions the fetus is poisoned within the uterus.[70] To speak of a "right not to remain pregnant" without acknowledging that this entails the concrete destruction of the fetus is for almost all contemporary abortions a meaningless abstraction.[71]

Tribe's invocation of women's experience is also highly problematic, precisely because many women characterize their abortions as killing.[72] If women experience abortion as killing, and they are granted the right to abort, then they will certainly experience themselves as possessing the right to kill. Consider the following woman's description of her saline abortion:

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68. *See id.* at 104.

69. *See* Smolin, *infra* note 140, at 151-54, 158-59.

70. *See* Henshaw, *Characteristics of U.S. Women Having Abortions, 1982-1983*, 19 FAMILY PLANNING PERSPECTIVES 5, 6 (Jan/Feb. 1987)(number and percentage distribution of legal abortion by method); Galen, Chauhan, Wietzner & Navarro, *Fetal pathology and mechanism of fetal death in saline-induced abortion: A Study of 143 gestations and critical review of the literature*, 120 AM. J. OBSTET. & GYNECOL. 347 (1974); W. HERN, ABORTION PRACTICE 101-60 (1984) (describing first and second trimester abortion techniques); J. PRITCHARD, P. MACDONALD & N. GRANT, WILLIAMS OBSTETRICS, 478-83 (17th ed, 1985) (listing and briefly describing abortion techniques); M. DENES, IN NECESSITY AND SORROW xv, 221-24 (1976)(pro-abortion rights psychologist describes surgical abortion procedure she witnessed).

71. Even the Supreme Court has acknowledged that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." Harris v. McRae, 448 U.S. 297, 325 (1980).

72. *See* M. ZIMMERMAN, *supra* note 15, at 194-95; L. FRANCKE, *supra* note 15, at 61, 64, 75, 84, 90, 99-100, 222, 235; D. REARDON, *supra* note 14, at 79, 146, 149.

> [the doctor] injected 200 cc's of the saline solution—half a pint of concentrated salt solution. From then on, it was terrible. My baby began thrashing about—it was like a regular boxing match in there. She was in pain. . . .For some reason it had never entered my mind that with an abortion she would have to die. I had never wanted my baby to die; I only wanted to get rid of my 'problem.' But it was too late to turn back now. There was no way to save her. So instead I talked to her. I tried to comfort her. I tried to ease her pain. I told her I didn't want to do this to her, but it was too late to stop it. I didn't want her to die. I begged her not to die. I told her I was sorry, to forgive me, that I was wrong, that I didn't want to kill her.[73]

Abortion rights, in other words, offer an illusory promise to women: that they can "get rid of their problem" without killing their baby. This illusion is fostered by the well-known practice of failing to inform potential aborters of the facts of fetal development,[74] a practice fostered by the Court's invalidation of informed consent laws in *City of Akron v. Akron Center for Reproductive Health, Inc.*,[75] and *Thornburgh v. American College of Obstetricians and Gynecologists*.[76] Yet, whether it be during the abortion procedure itself, or, more commonly, years later—for example when the woman experiences a "wanted pregnancy"—the woman eventually discovers the facts of fetal development. It was a baby, not a blob, not a "product of conception." It *looked like a baby*. At this point, Tribe's abstractions become absurdities.

B. Autonomy and Equality

Professor Tribe states that "[l]aws restricting abortion so dramatically shape the lives of women, and only of women, that their denial of equality hardly needs detailed elaboration. While men retain the right to sexual and reproductive autonomy, restrictions on

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73. D. REARDON, *supra* note 14, at xvi.

74. There is much evidence that abortion providers fail to provide clients with the facts of fetal development and even answer client questions in misleading ways. The evidence includes the fact that the abortion rights community has maintained that it is unnecessary and even intrusive to require that such disclosures be made. Other evidence includes the work of investigative reporters, *see* Sontag, *An Abortion*, Miami Herald, Sept. 1989, Tropic, at 8, 14, and the recorded experiences of women who abort, *see* M. ZIMMERMAN, *supra* note 15, at 184; D. REARDON, *supra* note 14, at 17. The record in one abortion case indicated that the only subjects discussed in pre-abortion counseling included "a description of abortion procedures, possible complications, and birth control techniques. . . ." *See* Planned Parenthood v. Danforth, 428 U.S. 52, 91, n.2 (1976)(Stewart, J., concurring)(quoting Brief for Appellants at 43-44, Bellotti v. Baird, 428 U.S. 132 (1976)).

75. 462 U.S. 416, 442-45 (1983).

76. 476 U.S. 747, 759-65 (1986). Informed consent statutes of the kind invalidated in *Thornburgh* would probably be upheld by the current Supreme Court. *See* Smolin, *infra* note 140, at 131-42. Pennsylvania has enacted a new informed consent statute, portions of which are currently being tested in the courts. *See* 18 PA. CONS. STAT. ANN. § 3205 (Pardon 1990).

abortion deny that autonomy to women."[77] His point, which echoes that of a myriad of academic writers, is that abortion restrictions do not permit women to be equally autonomous. We do not, Tribe argues, require men to use their bodies to save the lives of their children; thus, even if fetuses are human babies, we should not require the same of women.[78]

Tribe purports to be making a legal argument under the equal protection clause, but fails to adequately address any of the following standard objections. First, the Court has previously refused to consider abortion restrictions as evidence of discriminatory intent or a violation of equal protection.[79] Second, even if pregnancy and childbirth disadvantage women—a fiercely ideological contention—the equal protection clause generally does not require equality of outcome.[80] Third, gender discrimination demands only intermediate scrutiny, and thus state statutes that are substantially related to the achievement of important governmental objectives are upheld.[81] Application of gender discrimination standards therefore cannot save the *Roe* framework, which is dependent on strict scrutiny and the holding that the state interest in fetal life is not "compelling" until viability. Indeed, *Roe* stated that the state had an "important and legitimate interest" in protecting fetal life which grows "in substantiality" throughout pregnancy.[82] Strict abortion prohibitions therefore could be upheld under intermediate scrutiny.

Similarly, Tribe's rhetorical insistence that abortion restrictions pose "an obvious danger of majoritarian oppression and enduring subjugation"[83] overlooks the fact that women comprise a majority of voters.[84] Since Tribe purports to reject the "false consciousness" theory that women are brainwashed into being pro-life,[85] his concerns seem somewhat misplaced. Beyond Tribe's superficial legal analysis and flawed rhetoric, however, lies an important ideological issue: is the right to kill good for women? One might begin by noting that Tribe presumes that the goal of equality is to be equally *autonomous*. There exist a large number of women who define equality in other terms. Indeed, to many women the ideal of women being self-defining and autonomous in the realm of sexuality and reproduction

77. L. TRIBE, *supra* note 1, at 105.
78. *Id.* at 133.
79. *See* Harris v. McRae, 448 U.S. 297, 322-23 & n.26 (1980); Maher v. Roe, 432 U.S. 464, 469-71 (1977); Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 66-67 (1976).
80. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).
81. *See* Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982).
82. *See* Roe v. Wade, 410 U.S. 113, 162-63 (1973).
83. L. TRIBE, *supra* note 1, at 105.
84. *See* DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 15, 257 (1989).
85. L. TRIBE, *supra* note 1, at 239.

is repugnant. From this perspective, an argument that abortion regulation leaves women less autonomous than men becomes irrelevant. Many would argue that Tribe is accepting male sexuality—and an unattractive, raw version of male sexuality at that—as the norm. Woman's inherently more relational sexuality is thereby presumed "abnormal."[86] The ideal of autonomy, in other words, can itself be deemed a sexist ideal.

Moreover, women will never be equally autonomous, because women will always pay a higher price for their autonomy. Only women have to kill in order to attain a male-like degree of autonomy. Only women have to experience the pain and physical intrusion of abortion to achieve autonomy.[87] Only women have to experience the act of the fetus being torn from her body, or dying within her body, to achieve autonomy.[88]

Some women, of course, may value autonomy enough to kill for it. Indeed, some women may urge other women to affirm themselves through adopting a set of values that says: "My autonomy is important enough to justify destroying a fetus." Women who fail to bury their guilt may be considered weak and maladjusted. This form of radical feminism, in other words, has its own peculiar form of machoism. Abortion itself can become a kind of ceremonial initiation or rite of passage.[89]

Given, however, that women are differently situated than men—they will always have to kill for their autonomy—the question remains whether male-like autonomy is the ideal which the law

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86. Some may argue that it is sexist to term female sexuality "inherently" more relational. If sexuality, however, is viewed as including the capacity to gestate and birth, and if gestation and birth create a relationship between mother and child that is unavailable to males, then it seems correct to state that female sexuality is inherently more relational. It certainly seems artificial to speak of female sexuality without including the capacities to gestate and birth: surely these are part of a woman's "sexuality." The view that sexuality only properly includes physical intimacy, or the sex act, defines human sexuality by a male standard, and fails to account for the full drama of human reproduction.

87. It is apparent from abortion accounts that women experience abortions in different ways; some clearly experience the procedure as being very physically painful. *See* L. FRANCKE, *supra* note 15, at 90, 96, 99, 111; D. REARDON, *supra* note 14, at 79, 146, 148; THE NEW OUR BODIES, OURSELVES, *supra* note 15, at 302. Given the nature of abortion techniques and pregnancy, it is inevitable that abortion at least be physically intrusive. *See* D. REARDON, *supra* note 14, at 89 ("[a]bortion is a surgical procedure in which a woman's body is forcibly entered and her pregnancy is forcibly 'terminated' "); THE NEW OUR BODIES, OURSELVES, *supra* note 15, at 293-96 (describing abortion techniques); W. HERN, *supra* note 70.

88. Accounts of abortion experience indicate that women who abort sometimes resent men in general, or their sexual partner in particular, because males are not burdened with abortion and cannot understand the abortion experience. *See* THE NEW OUR BODIES, OURSELVES, *supra* note 15, at 308; L. FRANCKE, *supra* note 15, at 107-08, 194, 196.

89. *Cf.* OUR BODIES, OURSELVES, *supra* note 15, at 307; D. REARDON, *supra* note 14, at 75-76.

ought to embody. The literature recounting the experiences of aborting women suggests that many of them become victims of legal abortion because its promise of equality is profoundly false. In the end, they do not merely end a pregnancy—they kill a baby. Our laws, our academic institutions, the abortion industry, the media, and her male partner typically all conspire to seduce the aborting woman. The law calls an abortion a "right;" despite our relativist academic theories, there are many in the general public who are misled by such terminology into believing that abortion must be "right," or at least must not be killing. Academics and the media focus the abortion debate on the law's abstractions while largely ignoring fetal development and the harsh realities of precisely what the abortion procedure does to both the unborn child and her mother. Boyfriends urge abortion, and refuse emotional or financial support if the woman births the baby; the woman is forced to choose between her boyfriend and her baby, only to discover later that the relationship with the boyfriend did not survive the abortion.[90] The abortion provider assures the woman that the fetus is only a blob, or a product of conception, and tells her how much "safer" abortion is than childbirth. Surveys of aborting women tell a sad story of women who often want their babies,[91] women who often are aware of

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90. The role of the boyfriend is a paradigm of the broader issue of how others influence the woman's decision to abort. The role of others, including boyfriends, husbands, parents, in-laws, and friends, is clearly important. It is clear that men sometimes urge abortion, and that male refusal to provide emotional or financial support for childbirth and child care is a significant factor in many abortion decisions. The frequency with which women are swayed by others to abort is, however, controversial. *See* D. REARDON, *supra* note 14, at 11, 78-79, 123-26; L. FRANCKE, *supra* note 15, at 47, 78-81, 85, 89, 90, 94; M. ZIMMERMAN, *supra* note 15, at 113-37, 188-92.

Francke describes the pathetic situation of an eighteen year old married woman, Shelby Winters. Shelby felt forced by financial and in-law troubles to abort her first child. L. FRANCKE, *supra*, at 94. Shelby's face was red and swollen from crying as she explained her determination to abort a baby whom she professed to love:

> I think abortion is best for both my husband and me . . . . The problem is deep down I want to keep the baby. I realize it's not the smart thing to do. The abortion will give us more of a chance to get something. But I think about the baby all the time, about my little girl. That's what I had always hoped it would be if I would have had it. If it had been born, what would she have looked like? I just guess I feel bad that when my next one comes along that I would have had another one that I love. . . .I come in tomorrow. I'm going to go through with it. I hope I feel better than I do today. I love the baby. I love my husband. I just think it would be better for him if I have the abortion. . . .I know I can have another baby someday. But it's this one I love now. I just love her so much. . . .

L. FRANCKE, *supra*, at 94-95.

Francke states that "[i]n my research, almost every relationship between single people broke up either before or after the abortion." L. FRANCKE, *supra*, at 47. Zimmerman noted a similar but less invariable pattern of relationship termination, but also found that some relationships were maintained or even cemented. *See* M. ZIMMERMAN, *supra*, at 188-92.

91. Thirty percent of the women in Zimmerman's study stated that they wanted to have the baby; only thirty-eight percent explicitly stated they did not want

abortion as killing,[92] women who are uncertain of their decision but who abort because they are alone or because the father has urged it, or because they have accepted society's message that this is a reasonable solution to their "problem." In the end, however, it is the woman—usually alone—who is left with the realization that she killed a baby that she would, under other circumstances, have wanted to keep and love. I suppose one can view this result as autonomy, or self-determination for women, or making the best out of a bad situation. It appears to many, however, to constitute simply an easy way out for men and society, and a sad continuation of the tradition that relegates the actual needs and desires of women to second-class status.

IV. Critique of Chapter Six: "The Equation's Other Side: Does It Matter Whether the Fetus Is a Person?"

The purpose of this chapter is to defend *Roe*'s balancing of the woman's fundamental right (discussed in chapter 5) and the state interest in fetal life. The chapter articulates prevalent academic arguments stating that *Roe* was correctly decided even if a fetus is a person. Tribe describes Judith Jarvis Thomson's famous violinist hypothetical: you wake up attached to an accomplished violinist, who will die if unplugged from your circulatory system anytime in the next nine months. If you allow the physical attachment to continue for the requisite period, you will experience a lifelong emotional attachment to the violinist. Are you morally or legally required to allow the physical attachment to continue in order to save the violinist's life? Thomson concluded that you would possess the legal right to unplug the violinist. Therefore, Thomson argues, women ought to have the right to abortion regardless of whether the embryo or fetus is a person.[93]

Tribe notes the fact that Anglo-American law generally rejects the Good Samaritan, or rescue principle, as a legal obligation. He also notes that the law does not require a male parent to use his body to save the life of a born child. For example, a father would not be required to donate a segment of his liver, even if he were the only possible donor. Since we do not require men to be virtuous, we

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a child. *See* M. Zimmerman, *supra* note 15, at 110-111. Reardon also reports that a significant number of women wanted to keep their baby. *See* D. Reardon, *supra* note 14, at 12. The specific case reports of women who wanted to birth their babies but aborted them are often filled with sadness. *See, e.g.*, L. Francke, *supra* note 15, at 85, 89-90, 94-95, 99; D. Reardon, *supra* note 14, at 78-79.

92. *See supra* notes 72-73 and accompanying text.

93. *See* L. Tribe, *supra* note 1, at 129-30 (citing Thomson, *A Defense of Abortion*, 1 J. Phil. & Pub. Aff. 47 (1971)).

cannot, Tribe argues, require it of women.[94] Indeed, "to impose virtue on *any* person demeans that person's individual worth."[95] Therefore, most abortion restrictions violate the equal protection clause, because they remove a woman's right to be as autonomous as a man in the areas of sexuality, procreation, and control of one's body.[96]

The argument in many respects elaborates that critiqued in the previous chapter. Tribe is presuming that male sexuality and autonomy are the ideals for law and female sexuality. Those who disagree with this premise will find his argument unpersuasive.

Moreover, Tribe's argument subtly incorporates his autonomy presuppositions in ways his readers may at first miss. Tribe initially discusses the Good Samaritan principle at some length without telling his lay readers that parents are required to act affirmatively on behalf of their children in Anglo-American law.[97] The implied message is that fetus and mother, like the violinist and attached individual in Thomson's hypothetical, are initially strangers. This premise of mother and fetus as strangers follows from Tribe's argument that abortion restrictions force women to become mothers, because pregnancy changes their self-conception or "identity."[98] "Motherhood" is thus defined subjectively in terms of the woman's experience of herself, rather than objectively in terms of the existence of a dependency relationship between a woman and her offspring. It is typical of the autonomy perspective to characterize relationships in terms of what they subjectively mean to an individual, rather than in terms of objective relationships and obligations.[99] From the pro-life perspective, of course, abortion is too late to prevent motherhood. Even subjectively, it is clear that many women experience themselves as in relationship to their fetus before, during, and after abortion, and thus experience abortion as killing their offspring.[100]

When Tribe belatedly admits that parents are under affirmative legal obligations, he claims that "nowhere do we require a voluntary

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94. *Id.* at 130-35.
95. *Id.* at 135.
96. *Id.* at 135.
97. Tribe's discussion of the Good Samaritan begins at page 130, but it is not until page 133 that Tribe informs the reader that "the relationship between a parent and a child carries with it more legal obligation than the relationship between two strangers. . . ." *Id.* at 130-35.
98. *See id.* at 104.
99. For example, Justice Blackmun's dissent in Bowers v. Hardwick stated that "we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households." Bowers v. Hardwick, 478 U.S. 186, 205 (1986).
100. *See* M. ZIMMERMAN, *supra* note 15, at 194-95; L. FRANCKE, *supra* note 15, at 61, 64, 75, 84, 90, 95, 99-100, 222, 235; D. REARDON, *supra* note 14, at xvi, 79, 86, 146, 149.

parent to make, for an already born child, the kind of sacrifice some would have us impose on the pregnant woman in the name of the fetus."[101] Thus, Tribe notes that a father would not be required to donate a segment of his liver to save his child's life. Abortion restrictions then appear sexist because they require women to act affirmatively to save their unborn children even though the law fails to require parents to similarly act affirmatively to save their born children.[102] This second argument has a surface plausibility. Even if we grant that mother and fetus are not strangers, and that parenthood involves affirmative duties, why does the law require more of women carrying fetuses than of parents generally?

Tribe's comparison of abortion and liver tissue donation, however, depends on acceptance of his characterization of abortion as mere nonfeasance, or mere failure to rescue. This is particularly true because Tribe declares the malfeasance/nonfeasance distinction to be fundamental to upholding autonomy: "to make a man serve another is to make him a slave, while to forbid him to commit affirmative wrongs is to leave him a free man."[103] Tribe frequently characterizes abortion prohibitions as requiring the mother to act affirmatively—carry a pregnancy to term.[104] This terminology, however, ignores the nature of both abortion statutes and abortion. Abortion restrictions do not require women to carry pregnancies to term. Thus, miscarriage, for example, is not a violation of an abortion statute. Abortion statutes prohibit malfeasance, i.e., intentional or reckless actions that are injurious to the fetus. Once this point is granted, Tribe's entire argument collapses, because the abortion/liver donor distinction is explained. Abortion is prohibited because it constitutes the affirmative act of removing the fetus from the uterus, usually by dismemberment, while the parent who fails to donate the liver escapes legal condemnation because he merely failed to use his body to affirmatively aid his child. Since Tribe has supported the fundamental distinction between malfeasance and nonfeasance as basic to autonomy, he cannot complain when that distinction is used to distinguish abortion from liver donation.

Any use of the doctrine of rescue to support abortion rights, and any corollary discussion of "forced virtue," requires us to view abortion as mere nonfeasance: the mere failure to "continue a pregnancy to term." Part of what gives Thomson's original argument its surface appeal is that she conceived a situation, the attached violinist, where the act in question—unplugging—is ambiguous enough to

101. L. TRIBE, *supra* note 1, at 133.
102. *Id.* at 133-35.
103. *Id.* at 131 (quoting Hale, *Prima Facie Torts, Combination and Non-Feasance* 46 COLUM. L. REV. 196, 214 (1946)(emphasis omitted)).
104. *See, e.g.*, L. TRIBE, *supra* note 1, at 102, 104, 135.

be characterized as nonfeasance. Indeed, since Thomson's example places the individual in the position of a life-support machine, and since it is common to consider removal and refusal of life-support machines as ethically and legally equivalent, it appears plausible that unplugging the violinist is mere nonfeasance.[105]

Thomson's and Tribe's argument therefore implicitly assumes that abortion is like unplugging a life-support system. The assumption appears plausible because the body of the woman is in fact a life-support system for the fetus. *Unplugging the machine and unplugging the violinist, however, are neither subjectively nor objectively anything like an abortion.* This is true for two reasons. First, stopping the operation of a machine appears to be mere nonfeasance because machines do not necessarily operate for any particular period of time; indeed, they usually require a constant source of electricity to continue. The same is largely true for Thomson's hypothetical attachment to a violinist, which is itself an arbitrary creation of medical science. A pregnancy, however, is a complex, self-regulating physiological process that generally will continue for a certain period—approximately 40 weeks from last menstrual period ("LMP")—unless someone does something: "terminates" the pregnancy. Second, because pregnancy is a complex physiological process designed to continue for a particular period of time, interrupting it is nothing like unplugging a machine (and also nothing like unplugging the violinist). Pregnancy "termination" upon examination is a nice euphemism for acts that, from the viewpoint of both mother and fetus, are quite active and quite forceful: usually an intrusion through the cervix and into the uterus followed by physical dismemberment and removal of the fetus; sometimes an intrusion followed by salt poisoning of the fetus and then labor; occasionally surgical removal of the fetus or artificial inducement of premature labor.[106] Most abortions would be excruciatingly painful for the woman without anesthetic (and some are anyway).[107] Abortion interrupts the complex physiological, hormonal and psychological relationship of mother and fetus in a manner that may only be described as an active intrusion. Abortion is therefore nothing like flipping a switch, or disattaching a mechanical tube. Abortion is unambiguously an affirmative action—malfeasance—in the traditional criminal law sense.

Tribe's rescue analogy therefore stumbles at the same point as

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105. Thomson's presumptions that abortion is mere nonfeasance and that mother and fetus are initially strangers is underscored by her later comparison of abortion to the failure of Henry Fonda to save her by applying his "cool hand to my fevered brow." 1 J. PHIL. & PUB. AFF. 47, 55 (1971).

106. *See supra* note 70.

107. *See supra* note 87.

his equality argument: an unwillingness to consider, where it counts, the concrete reality of abortion. Tribe would apparently like to live in a world in which women were equally autonomous, in their sexuality, to men. He can produce that world on paper by a series of abstract distinctions in which abortion and abortion rights reference mere failures to continue the virtuous act of fetal rescue commonly called pregnancy. These abstract characterizations of abortion, however, fail completely to account for the harsh reality of abortion, either as experienced by the woman or her unborn child.

Tribe, and probably many others, presumably would argue that the refusal to accept this package of analytic abstractions demonstrates sexism. Refusing to consider dismemberment as "nonfeasance" constitutes, from this viewpoint, subordinating women through the unfair and presently unalterable fact that fetuses appear unwanted inside of women, rather than inside of men. Indeed, even calling it dismemberment is unfair. The reality that over 90% of pregnancies are "terminated" in this fashion[108] must give way to the abstract truth that fetal death is actually necessitated merely by a refusal to "continue pregnancy." Jurisprudence is thus given the task of eliminating the effect of any "unfair" distributions of burdens which nature may have created.

It is worth underscoring again that even Tribe cannot truly eliminate all unequal burdens. It will still be women who will have to choose and undergo the abortion, rather than men. The review of woman's experiences that have been published would indicate that this is a substantial burden.[109] Given that burdens cannot be truly made the same, it is worth asking how they are best made most nearly equivalent. This question, of course, is fiercely ideological.

For those who hold fast to radical autonomy as the ultimate goal of both male and female sexuality, the choice is clear: it is better for women to be autonomous, even if it requires more pain than it does for men. Sameness remains the test of equality. If men and women cannot be perfectly the same, nonetheless we ought to provide the nearest degree of sameness as possible. The abstracting of abortion as nonfeasance then becomes the means of justifying the destruction of the autonomy of the fetus. The abstraction allows one to say: men and women are really the same in relation to the fetus, therefore women are as free as are men to abandon them. It becomes a kind of syllogism. One begins with the image of woman as man and fetus as stranger or artificially attached appendage. One

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108. *See* Henshaw, *supra* note 70, at 6 (instrumental evacuation, which includes suction and sharp curettage, and dilation and evacuation at 13 weeks gestation and beyond, was abortion method used in 96.8% of abortions in 1983).

109. *See supra* note 15.

ends by declaring that any other version is sexism.

One may ask, however: even after an academic, legal, and media campaign of at least a generation, do women themselves want it this way? Do women want to measure equality in terms of sameness? Do they want to measure their sexuality by male sexuality? Do they want to measure relationships by autonomy? There is much to suggest otherwise. First, opinion polls show little or no difference between how women and men view abortion rights.[110] Second, it has been recognized that "for the women who now constitute the great majority of activists in both camps, values central to their lives are at stake."[111] Third, it is evident that abortion divides America according to class, rather than gender: it is the elite who embrace abortion rights.[112] Abortion rights are thus arguably more about continuing elite class domination of America than about ending male domination of women.

One cannot simply say that one must leave women free to choose between autonomy and more traditional roles, at least so long as choice means the choice to kill. Some women may be willing to kill for their autonomy. Society, however, cannot allow a defenseless minority to be slaughtered in large numbers for the sake of the autonomy of a stronger, more powerful group. Building the self-respect of women on the bodies of their unborn children resembles the pathetic attempt of some lower-class whites to build self-respect through denigration and control of African-Americans.

The justification of abortion rights through abstractions that distort the concrete nature of abortion should trouble even those who adhere to the autonomy principle. Abortion rights are not ultimately abstractions. They are exercised by real women who abort real fetuses. Discussion of the exercise of rights therefore must maintain some reasonable relationship to reality. If we are talking about the right to kill, we ought simply to say it: anything less smacks of sophistry. At least then we would know that those who killed did it open-eyed, rather than being misled by the pretenses and rhetoric of judges and academicians.

Ultimately, Tribe's defense of abortion is unsatisfactory even from within an autonomy framework because he has not explained why killing a fetus is justified. Instead, he has simply abstracted and distorted the nature of the act. Tribe, however, makes a series of

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110. *See, e.g.*, THE CONNECTICUT MUTUAL LIFE REPORT ON AMERICAN VALUES IN THE '80's 92 (1981); G. GALLUP, JR., THE GALLUP POLL: PUBLIC OPINION 1986 49 (1987).

111. M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 47 (1987)(citing K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 158-61 (1984)).

112. Tribe concedes the "uncomfortable truth that the pro-choice movement draws its support disproportionately from various privileged elites." *See* L. TRIBE, *supra* note 1, at 238.

separate arguments to cast doubt on the "personhood" of the embryo or fetus. These arguments are intended to question the core of the pro-life position and therefore must be carefully examined.

Tribe considers and largely rejects two arguments against personhood. First, he discusses the views of Dr. Charles Gardner, who argues that genetic identity or uniqueness, though formed at fertilization, is not equivalent to personhood because it is a mixture of chance and planning (genetics) that produces our uniqueness. Gardner particularly cites the fact that identical twins have different fingerprints. Gardner's argument is apparently that genetic uniqueness is not sufficient for personhood because it is not completely determinative of our development. Tribe admits that the argument proves too much: "It does not prove that the fetus is less a human being than any of us. The particular and distinctive person *you* might become, even today, is 'not yet there' either."[113] Tribe concedes that none of us are persons under Gardner's definition; therefore the definition is useless.[114] Tribe seems correct. Gardner's statement that the development of the embryo is a combination of genetics and future events, or chance, is apparently simply an acknowledgement that each organism interacts with environment over time, and is thereby changed. Indeed, since this principle is true for both embryo and infant, Gardner's argument seems to support the pro-life position that both are equally individual human organisms.

Second, Tribe rejects the view that the personhood question cannot be asked by government because it is inherently religious in nature. He quotes with approval Justice Brennan's statement that "[r]eligionists no less than members of any other group enjoy the full measure of protection afforded speech, association and political activity generally."[115] Tribe rejects the view that moral questions can be "kept out of the political realm merely because many religions . . . take strong positions on it."[116] He thus accepts the American tradition of political activity by religious groups as normative and nonviolative of the establishment clause.[117]

In casting doubt on the personhood of the unborn, Tribe argues as follows: It is untenable that the fetus is a person (either for constitutional or state law purposes) because such a view would produce results that are unacceptable. It would be tedious and unnecessary to list and rebut all of Tribe's claims regarding the supposedly disas-

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113. *Id.* at 119 (citing Gardner, *Is an Embryo a Person*, NATION 557-58 (Nov. 13, 1989)).

114. *See id.* at 117-119.

115. *Id.* at 116 (quoting McDaniel v. Paty, 435 U.S. 618, 641 (1978) (Brennan, J., concurring)).

116. *Id.*

117. *See id.*

trous consequences of fetal personhood. The following are representative and most relevant: the abortionist must be punished as a murderer and the woman as an aider and abetter or attempted murderer;[118] even abortions to save the life of the mother would be prohibited;[119] some forms of contraception, such as the IUD, would be rendered illegal;[120] and 15 year olds could sue to get a driver's license based on their conception date.[121]

Tribe's plausibility argument is related to his motivational argument: since considering the fetus a person produces legal consequences no one supports, it is unlikely that a belief in fetal personhood "really does underlie the views of most people who want to restrict or prohibit abortions."[122] Tribe's argument is not new, and represents a variant of a common tactic of pro-abortion rights polemicists. Where pro-lifers are lenient, or grant exceptions, the suggestion is made that their proposals are irrational, inconsistent, or reflect ulterior motives. Where pro-lifers are strict, however, the accusation is made that they are inhumane, too harsh toward women, or impractical.[123] Tribe extends this dilemma by claiming that the pro-life position requires the most extreme measures. His analysis of the consequences of fetal personhood, however, is extremely illogical.

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118. *Id.* at 121-22.

119. *Id.*

120. *Id.* at 122.

121. *Id.* at 128.

122. *Id.* at 115.

123. For example, Professor Dellinger and Mr. Sperling recently noted that, prior to *Roe*, no state "took any steps to prevent affluent women from leaving the state to obtain abortion." *Abortion and the Supreme Court: The Retreat from Roe v. Wade*, 138 U. PENN. L. REV. 83, 108 (1989)(note omitted). This failure, they argued, constituted economic discrimination and demonstrated that the state's professed interest in fetal life either was less than compelling or else was a surrogate for other interests. *Id.* Tribe factually contradicts Dellinger and Sperling by stating that "[i]n the years before *Roe* at least one state in fact prosecuted a travel agent for arranging out-of-state trips for women who wanted to have abortions." L. TRIBE, *supra* note 1, at 127 (note omitted). The purpose of Tribe's statement is to demonstrate the negative consequences of allowing states to grant fetal personhood. Indeed, Tribe attempts to argue that states might "forcibly restrain" women from traveling to other states for abortions. *See id.* Thus, pro-abortion rights advocates turn both the failure to suppress travel for abortion, and attempts at such suppression, into arguments for abortion rights.

The abortion rights discussion of state suppression of abortion travel is silly. States lack the resources, ability, or even jurisdiction to do very much against out-of-state abortions. Granting fetal personhood does not require deleting the fourth amendment from the Constitution. The law simply does not permit individuals to be held, or stopped from traveling, based on suspicions that they will commit a crime sometime in the future. Thus, the failure to suppress abortion travel does not evidence any flaws in the state's professed interest in protecting fetal life. Fetal personhood, moreover, will not lead to pregnant women being held upon suspicion of planning future abortions, although an occasional prosecution for complicity for those who arrange abortion travel is possible.

Before examining in detail Tribe's claims, the inconsistency of his argument should be noted. Tribe claims: (1) accepting fetal personhood requires punishing all abortions as murder without exception[124] and (2) *Roe*'s holding permitting unrestricted abortion until viability is correct even if the fetus is a person.[125] Incredibly, he makes both claims *in the very same chapter*. Tribe might argue that claim one refers to constitutional personhood while claim two refers to state law personhood. However, the gap between constitutional and state law personhood seems a poor explanation of such diverging claims. These diverging claims suggest what subsequent analysis will demonstrate: that his pronouncements on the negative consequences of fetal personhood are a scare tactic with little relation to reality.

A. Fetal Personhood and Abortion Penalties

It may be true that the traditional grading of abortion as a lesser crime than murder reflects past or present societal uncertainty of the status of the fetus, or at least reflects legislative compromise of competing values. Adoption of the personhood premise, however, does not *mandate* punishing abortion as murder. It is obvious that not all killing of persons is equally punished. The grading of homicide statutes clearly reflects a judgment of culpability. Culpability, in turn, requires an examination of both mental state, and of special circumstances pertaining to mental state. The law is capable of extending to the woman a statutory mitigation or excuse, due to her special vulnerability and stress. Even the physician may be viewed as less culpable than a common murderer; he possibly was moved by misguided compassion for the woman, or simply was mistaken as to the medical necessity for the abortion. Similar results occur in areas where the personhood of the victim is widely accepted. Thus, courts have shown a reluctance to fully punish the killings of infants by their mothers, or of neonates or distressed adults by their physicians. There apparently exists a reluctance to fully punish a parent or physician. Society tends to view the parent as a victim of circumstances and the physician as well-intentioned, even if misguided. In any event, the punishment of a physician abortionist as a murderer is not the sort of untenable result that renders the personhood position implausible.

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124. L. TRIBE, *supra* note 1, at 121.

125. *Id.* at 129-38; *see also* AMERICAN CONSTITUTIONAL LAW *supra* note 5, at 1354-58 (*Roe* is correct even if "we view pre-viable fetuses as full human beings").

B. Fetal Personhood and the Life of the Mother Exception

Tribe claims that a life of the mother exception would be impermissible if fetal personhood was constitutionally recognized. He specifically rejects the view that an application of, or analogy to, self-defense principles, would support legalizing abortions necessary to save the mother's life.[126] Tribe's analysis is apparently derivative of his comparison of pregnancy to Siamese twins. He notes that neither Siamese twin has a prior claim to the organs they share, and therefore that we cannot kill one twin to save the other.[127] The comparison is faulted: Siamese twins share organs over which neither has a prior claim. The pregnant woman, even from a pro-life perspective, has a prior claim to her organs over that of her unborn child. The organs the fetus needs to survive are those of the mother. The mother's legal obligation to share them, or to refrain from killing the child within her, does not extend to the point of death. If only one may live, the pregnant woman, unlike the Siamese twin, has the legal right under standard self-defense principles to defend her life even if it requires active killing of her child. The innocence of the unborn child makes the choice tragic. It is, however, the necessity of the killing, rather than the moral innocence of the victim, that is relevant under standard self-defense principles. Thus, a parent would not be criminally punished for the killing of a psychotic child where the parent reasonably believed such killing necessary to save the parent's life.[128]

The prior claim of mother to her organs does not, of course, permit her to kill her unborn child for any reason. As a parent, she may only kill if necessary to save her own life. The prior claim, in other words, becomes relevant at the point at which only one may live. In the Siamese twin example, by contrast, even when that tragic dilemma appears we may lack a clear means of determining prior claim.

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126. L. TRIBE, *supra* note 1, at 121-22.

127. *Id.* at 121-22. Tribe, in comparing the separation of conjoined twins to to abortion, apparently assumes that abortion constitutes an affirmative act of killing. This assumption contradicts Tribe's assumption in his discussion of the Good Samaritan principle, that abortion is mere nonfeasance.

128. An extensive literature exists discussing the problem of the innocent aggressor. It appears to be generally conceded that the defensive killing of an innocent aggressor will not be criminally punished. The literature addresses jurisprudential issues relating to the rationale for this result and the technical distinction between justification and excuse. *See, e.g.*, Alexander, *Justification and Innocent Aggressors*, 33 WAYNE L. REV. 1177 (1987).

Although Tribe does not really explain the basis of his conclusion that "[n]o claim of self-defense" could justify a life-saving abortion, he had previously relied on the innocence of the fetus to argue that self-defense could not justify *Roe*'s holding invalidating previability abortion prohibitions. *See* AMERICAN CONSTITUTIONAL LAW *supra* note 5, at 1356.

Even if the self-defense analogy was flawed,[129] Tribe's claim that fetal personhood bars a life of the mother exception would be dubious. Pregnancy, as Tribe has elsewhere recognized,[130] is sui generis; it may require some unique rules in order to accommodate the situation of one human being living within another. The relationship of mother and fetus, unlike that of Siamese twins, cannot be considered a tragic oddity. Pregnancy is a fact of normal life; thus far, every neonate gestated within a woman. Surely pregnancy is an important enough situation that it can demand some rules crafted to take account of its particular difficulties, without literal adherence to principles crafted for other, less complex, relationships. Recognition of the personhood of the fetus should not bar recognition in law of the complex relationships and human needs inherent in human gestation.

Tribe's use of the Siamese twin analogy is illustrative of the pitfalls of discussing pregnancy by analogy: particularly when pregnancy is a normal situation and the analogies are rarities or merely hypothetical possibilities. When Tribe wants to emphasize the woman's freedom, he compares pregnancy to Thomson's attached violinist; when he wants to emphasize the woman's absolute responsibility, conjoined twins become the analogy. Both analogies, as noted above, are deeply flawed. Tribe's actual description of pregnancy, quoted in part above in regard to his derivation of abortion rights,[131] reflects the distortions of his contradictory Siamese twin/attached violinist pregnancy analogies:

> Although the fetus at some point develops an independent identity and eventually even an independent consciousness, it begins as a living part of the woman's body, growing from a single cell supplied by her and sustained solely by nutrients carried to it through her uterine wall. Fetal cells even circulate in the woman's bloodstream as her pregnancy progresses. To say that the fetus might have rights of its own does not demonstrate that it is somehow a being separate and distinct from its mother, at least in the beginning. It is not a lodger or prisoner or guest, nor is its mother a mere home or incubator. The fetus is, after all, her 'flesh and blood.'[132]

Tribe then argues that precisely because the fetus is "a part of the woman's body. . .infinitely more valued by nearly every mother than, say, her arm or her kidney," abortion prohibitions tell women

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129. *See* Davis, *Abortion and Self-Defense*, 13 J. PHIL. & PUB. AFFAIRS 175, 185-87 (1984)(discussing frequently noted possible flaws in use of self-defense to justify lifesaving abortions).

130. *See* AMERICAN CONSTITUTIONAL LAW, *supra* note 5, at 1356-57 (1988)(rejecting self-defense analogy based on view that relationship of woman and fetus requires a "unique legal analysis").

131. *See supra* note 61 and accompanying text.

132. L. TRIBE, *supra* note 1, at 102.

"what to do or not to do with her own body."[133] Thus, he considers the fetus, throughout much of pregnancy, as an actual part of the woman's body.[134]

Tribe's description of pregnancy is distorted by his inability to perceive that the woman could be deeply connected to the fetus, as her progeny dependent upon her for continued life, and yet, that the fetus simultaneously could also be a separate being. The problem is apparently Tribe's autonomy premise. Autonomy understands the separateness of individuals. Autonomy can also posit a relationship of intimacy between persons equally empowered to disassociate. The previability fetus, however, cannot disassociate without dying. Tribe has previously argued that this "unique dependency" of the fetus justifies *Roe*'s viability standard.[135] It is as though he cannot imagine a human relationship in which one individual is bound to the other, completely unable to disassociate, without stripping that helpless individual of his or her identity, or even bodily existence: the uniquely dependent individual merges into the identity or body of the person on whom they are dependent. To Tribe, persons are implicitly those capable of making self-defining associational choices. Since a fetus does not fit the definition, it cannot be a person, or a subject of rights. It is, of course, the human condition to be gestated in relationship to a woman on whom we are uniquely dependent. Tribe's rejection of fetal rights is perhaps a revulsion at the limiting, anti-autonomy implications of the fetal-mother relationship, with its corollary roles of dependency and obligation. From another perspective, of course, there is real beauty in such a relationship.

C. Fetal Personhood and Contraception

Tribe's argument that accepting fetal personhood would likely result in banning the IUD and some birth control pills repeats a common pro-abortion rights scare tactic.[136] His language is ambiguous and misleading. First, he claims that "some of the most com-

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133. *See id.*

134. *See id.* It would be possible to argue that abortion prohibitions tell women what to do or what not to do with their bodies even if the fetus is not a part of a woman's body. Pregnancy undeniably involves the woman's body; the woman's body undeniably sustains the life of the fetus, even if the fetus itself is not merely a part of the woman's body. Tribe, however, appears to characterize pregnancy in such a way that the fetus not only relies on the woman's body, but also constitutes a part of the woman's body. *See id.*

135. *See* AMERICAN CONSTITUTIONAL LAW, *supra* note 5, at 1357-58 (1988).

136. For example, during oral arguments in *Webster*, Frank Susman claimed that removing the abortion right would "unravel the whole cloth of procreative rights," including the contraceptive right. Susman argued that there was no longer a constitutional distinction between abortion and contraception, largely because IUD's and low-dose birth control pills "act as abortifacients." *See supra* note 36.

monly used methods of birth control, such as the IUD and even some types of the pill, operate as abortifacients, or abortion causing-agents. That is, they do not invariably prevent conception so much as arrest the embryo's development and implantation in the uterine wall at a very early stage in pregnancy."[137] Tribe here appears to be saying that these contraceptives are usually or often abortifacients, although he ambiguously uses the term "invariably." Later, he more tentatively states that "[b]oth the IUD and some birth control pills *may*" prevent implantation rather than conception.[138]

In fact, neither the IUD nor modern low-dose birth control pills are known abortifacients, at least when used precoitally. The IUD was previously believed to operate primarily by preventing implantation, but recent studies have indicated that it prevents fertilization.[139] Even modern low-dose birth control pills work primarily by preventing fertilization, either by preventing ovulation or changing the composition of cervical mucus. It is certainly possible (although unproven) that the IUD or birth control pills operate upon occasion to prevent implantation. Even if proven, this back-up mechanism would apparently be relatively rare, and thus would not render these contraceptives true abortifacients.[140] Fetal personhood simply does not require that a one in one thousand chance of an abortifacient

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137. L. TRIBE, *supra* note 1, at 95.

138. *Id.* at 122 (emphasis added).

139. *See* Alvarez, *New Insights on the Mode of Action of Intrauterine Contraceptive Devices in Women*, 49 FERTILITY & STERILITY 768 (1988); Segal, *Absence of Chorionic Gonadotropin in Sera of Women Who Use Intrauterine Devices*, 44 FERTILITY & STERILITY 214 (1985). Even the amicus curiae brief submitted by the Association of Reproductive Health Professionals ("ARHP"), which was submitted in support of abortion rights, conceded that "[t]he most likely working mechanism of an IUD is to prevent fertilization." Brief for the ARHP at 34, Webster v. Reproductive Health Services, 109 S. Ct. 3040 (1989) (No. 88-605). The ARHP brief did claim that "an IUD on occasion is thought to prevent implantation, particularly when inserted post-coitally." *Id.* at 34-35.

140. Making Choices, an informational guide published by the Alan Guttmacher Institute, states that suppression of ovulation is "the main mechanism of action" of oral contraceptives, but that two backup mechanisms exist for "the small percentage of cases in which the pill does not prevent ovulation." H. Ory, J. Forrest, & R. Lincoln, Making Choices: Evaluating the Health Risks and Benefits of Birth Control Methods, 5 (1983) (available from the Alan Guttmacher Instit., 360 Park Ave. South, New York, N.Y. 10010). One of those two backup mechanisms decreases the likelihood of implantation after fertilization and the other prevents fertilization. *Id.* Other sources indicate that it would be more accurate to state that a possibility exists that oral contraceptives occasional prevent implantation, but that this effect is technically unproven. The mere fact of a higher ovulation rate for modern low-dose pills does not necessarily prove a certain rate of implantation failure, because oral contraceptives also interfere with the ability of the sperm to reach the fallopian tubes. Even if one infers that oral contraceptives do occasionally prevent implantation, the incidence is apparently very low, or in any event not known. *See* Smolin, *Abortion Legislation After Webster v. Reproductive Health Services: Model Statutes and Commentaries*, 20 CUMB. L. REV. 71, 124-25 & n.153 (1989)(citing medical sources relevant to possible abortifacient effect of modern low-dose oral contraceptives).

effect render an otherwise useful drug or device illegal.

D. Fetal Personhood and 15 Year Old Drivers

Tribe states in regard to state law and fetal personhood: "A high school student who by ordinary calculations is fifteen years and three months old might argue, for example, that since under Missouri law, life begins at conception, he is eligible for the driver's license that the state does not want to give him until he is sixteen."[141]

It is hard to believe that a scholar of Tribe's repute would credit such an argument. The argument is not original with Tribe. Its currency, however, does not negate its silliness. Obviously state driving (and drinking) laws use the date of birth not to comment on the issue of when life begins, but to employ a simple and readily available method of dating. Unlike fertilization dates, birth dates are easily determinable. The legislature was simply saying that you are ready to drive sixteen years after you are born. This neither removes nor grants rights to the unborn, who obviously cannot drive. Surely fetal personhood does not remove the right of the legislature to use the more convenient date of birth for purposes of age-related rights.

E. Science and Fetal Personhood

Although Tribe rejects the view that science disproves fetal personhood, he argues that the high spontaneous abortion rate, monozygotic twinning, and embryo merger make the claim that a fetus is a person untenable.[142] Analysis of these objections demonstrate that they relate almost entirely to the period between fertilization and implantation of the embryo in the uterine wall. Implantation begins at five to seven days after fertilization and is completed by two weeks after fertilization. The appearance of the "primitive streak" at fifteen days is the distinguishing sign that a new stage of development has begun.[143]

Tribe specifically states that "some experts estimate that fully two-thirds of all fertilized ova fail naturally to implant in the uterus."[144] The high loss rate on which he is relying is thus a pre-implantation phenomenon. Monozygotic twinning (twins produced by division of a single zygote) usually begins around the end of the

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141. L. TRIBE, *supra* note 1, at 128.

142. *See id.* at 118, 123-24.

143. *See* T. SADLER, LANGMAN'S MEDICAL EMBRYOLOGY 37-56 (5th ed. 1985); K. MOORE, THE DEVELOPING HUMAN, CLINICALLY ORIENTED EMBRYOLOGY 37-54 (3d ed. 1982).

144. L. TRIBE, *supra* note 1, at 123.

first week but occasionally occurs between 9 and 15 days. Normal twinning occurs prior to the appearance of the primitive streak. Conjoined twins apparently may result from twinning at later points of development.[145] Embryo merger, a phenomenon which is apparently rare and in many respects is not yet understood, apparently occurs prior to the primitive streak stage.[146]

Arguments over the first fifteen days of development have little practical application to the contemporary abortion debate. The average woman will not even have missed her period by this point. A leading textbook on abortion practice states that "the risks of complications in very early pregnancy termination (5-6 weeks from LMP) outweigh the benefits."[147] Even the drug RU-486 is apparently employed after pregnancy is confirmed.[148] The only possible

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145. *See* T. SADLER, *supra* note 143, at 102-03, 106; K. MOORE, *supra* note 143, at 131-36.

146. Tribe, relying on Gardner, describes embryo merger as follows: "two sibling human embryos sometimes combine into one, yielding a completely new 'person' at the end of the developmental process. Any particular cell of that baby's body will have the genetic material of one or the other of the original embryos." L. TRIBE, *supra* note 1, at 118. Gardner's comments on embryo merger, which appear without citation to any scientific source, are as follows: "If a fertilized mouse egg from two white-furred parents goes through four cell divisions, the embryo will have reached the sixteen-cell stage. If this embryo is then brought together with a sixteen-cell embryo from two black-furred parents, a ball of thirty-two cells is formed. This ball of cells will go on to make a single individual with mixed black and white fur: one mouse with four parents, two white and two black. Any particular cell of its body has come from either the one set of parents or the other. A similar event sometimes occurs naturally in humans when two sibling embryos combine into one. The resultant person may be completely normal." Gardner, *Is an Embryo a Person*, NATION, 557-58 (Nov. 13, 1989). Gardner concludes from this phenomenon that individuality does not exist at this early stage. *Id.* at 558.

Assuming, as Gardner does, that the artificial process of mouse embryo merger is akin to a natural process of human embryo merger, the process would occur very early in pregnancy: the human sixteen cell stage is reached approximately three days after fertilization. *See* T. SADLER, *supra* note 143, at 29. The medical literature indicates less certainty than Gardner exhibits as to the existence of this natural process of human embryo merger. It is known that some human beings exhibit double genetic inheritance consisting of a mixture of two or more kinds of cells. This can occur either when the cells are from a single zygote, or when the cells are descended from the genetic equivalent of two zygotes. The former is termed a mosaic; the latter, which could involve "embryo merger," is technically labeled a chimera. *See* P. MOODY, GENETICS OF MAN 286 (2d ed. 1975). It is believed that this can be caused by incorporation of cells of one twin by the other twin, without necessarily compromising the health or survival of either twin. *See* E. NOVITSKI, HUMAN GENETICS 277-78 (1977). One source describes several additional ways in which a chimera could occur: "Two ova might be separately fertilized and then fuse together to give rise to one embryo. An ovum and a polar body might be separately fertilized and then fuse together. There are other possibilities. As likely an explanation as any would be an ovum containing two nuclei (one a retained polar body?) each of which was separately fertilized." P. MOODY, *supra*, at 286-87.

147. W. HERN, *supra* note 70, at 120.

148. *See* Kolata, *France and China Allow Sale of a Drug for Early Abortion*, N.Y. Times, Sept. 24, 1988, at 8, col. 1. Dr. Hodgen, scientific director of the Jones Institute for Reproductive Medicine at the Eastern Virginia Medical School, empha-

application of arguments involving early embryos to the abortion issue itself is the use of "morning-after" hormones or medications for sexual assault victims. These medications currently have too many side effects and risks to recommend their regular use in place of true contraceptives.[149] Obviously the debate over early embryos is important to the use of embryos outside of the woman. For Tribe's purposes of justifying abortion rights, however, the debate over the status of "pre-embryos," as early embryos are sometimes termed, is largely irrelevant.

The debate between the fertilization standard and the implantation standard occurs to some degree even within the pro-life community. The issues of twinning and pre-implantation spontaneous abortion rates raise interesting theological or philosophical questions pertaining to either "ensoulment" or "individuality." On the one hand, the zygote is in some sense an individual human life—an organism of the human species genetically distinct from either mother or father. The zygote is clearly alive, clearly human, clearly an identifiable individual organism. Twinning is possibly simply an alternative form of individual human reproduction. Embryo loss may represent an unfortunate reality of human life, or may represent primarily the incidences where the fertilization process was so defective that a "true embryo" was not formed. Embryo merger perhaps does not occur naturally in human embryos, or is so rare as to be virtually irrelevant: why determine the status of individuals based on a freak occurrence of nature?[150] On the other hand, twinning, embryo loss, and embryo merger may indicate that in some religious or philosophical sense a true human individual has not yet been formed. Obviously, this is a topic that could generate extensive discussion within a variety of philosophical or religious traditions. Just as obviously, it has little relevance to the current abortion debate Tribe claims to be addressing.

For better or worse, embryo development occurs very quickly. The heart begins to beat by 25 days; brain waves have been measured by 40 days; spontaneous movements of the arms, legs, and trunk exist by the eighth week.[151] Nine weeks from fertilization medical science labels the developing organism a "fetus" because "the main organ systems have been established" and "the major fea-

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sized that: "RU 486 is not a 'morning after' pill; it is to be used only after pregnancy is confirmed, usually 10 days or more after [sic] woman misses a menstrual period." *Id.*

149. *See Postcoital Contraception*, THE LANCET, Apr. 16, 1983, at 855 (discussing side-effects and risks of current regimen).

150. For a discussion of embryo merger see *supra* note 146.

151. *See* K. MOORE, *supra* note 143, at 306; S. REINIS & J. GOLDMAN, THE DEVELOPMENT OF THE BRAIN 225 (1980); Hamlin, *Life or Death by EEG*, 190 J.A.M.A. 108, 112-113 (October 12, 1964).

tures of the external body form are recognizable."[152] There are, in other words, fingers, toes, arms, legs, and a face: a recognizable, tiny, individual human being. These are the subjects of America's millions of abortions, and Tribe characteristically makes no effort to describe them, either scientifically or otherwise. Indeed, he embraces unrestricted abortion rights until at least the much later point of viability, when the woman is visibly bulging with a—no other word will suffice—"child" who is relatively large: a little more than half the length of a full-term baby.[153] More than one hundred thousand second trimester abortions are performed each year.[154] The description of these larger fetuses is therefore far more relevant to the abortion debate than discussions of pre-implantation spontaneous abortion or twinning.

Tribe stated in his 1988 treatise:

> Nor can one get anywhere on this issue by debating whether 'fetal life' is 'human life': what other form or species of life could it be? There is simply no intellectually honest way of getting around the fact that the interest in preserving the life of a fetus is significant.[155]

Tribe's claim in *Abortion* that science cannot prove the "personhood" of the fetus, and that science actually makes the claim of personhood implausible, is therefore somewhat confusing. The confusion apparently has two sources. First, the biological component has three elements: (1) humanity, (2) life, and (3) individuality. Tribe's prior concession regarding the fetus as human and alive does not prevent him from claiming that it is not an individual human life, either in the sense of being separate from the mother, or of being determinately one being instead of two, or one-half (embryo twinning and embryo merger). Tribe's discussion of individuality, however, obscures the apparent fact that by the time most abortions are done, science can establish individuality. That is, by the fetal stage (and probably well before the fetal stage) the organism is clearly both distinct from the mother and a single individual. Therefore, Tribe improperly ascribes an uncertainty to science that does not exist. In the scientific sense, the organism is by the fetal stage an *individual* human life.

The second source of confusion, however, is the use of the term "person." Tribe unfortunately never defines this term. Clearly, it

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152. T. SADLER, *supra* note 143, at 58.

153. A fetus of 21 to 24 weeks gestation (LMP) has a crown-rump length of 20-23 cm; a fetus of 37-40 weeks gestation (LMP) has a crown-rump length of 35-36 cm. *See id.* at 79.

154. *See* U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 70 (1988); Henshaw, *supra* note 70.

155. AMERICAN CONSTITUTIONAL LAW, *supra* note 5, at 1348-49 (footnote omitted).

can be used in many senses: legal, philosophical, or theological. Arguably, it is not a scientific term at all. Science can tell us whether an organism is an individual; whether it is alive; whether it is of the species homo sapiens.[156] In one sense, the "personhood" debate is between those who would accord legal or moral personhood to all those who are individual, live organisms of our species, and those who use a restrictive definition. *Roe*, for example, held that the capacity for survival separate from the mother's body is determinant of when the state's interest in fetal life becomes compelling. This acknowledgement of a compelling state interest in fetal life constitutes a recognition of partial legal personhood. Full constitutional personhood under *Roe* is not recognized until birth.[157] Justices Stevens, Blackmun, Brennan, and Marshall have subsequently suggested that the capacities to feel pain, to feel pleasure, and to react to surroundings represent additional factors relevant to evaluation of the states's interest in fetal life.[158] Clearly, all of these restrictive

156. The term "individual" might be the most difficult to define scientifically. "Individuality," like personhood, has sometimes become a term expressive of a value judgment. Science can clearly tell us that an organism is individual in two empirical senses: it is currently an identifiable, functioning biological entity distinct from other organisms; its current individuality is or is not subject to change through reproduction or merger. It will be a value judgment, for example, whether specific failures of individuality in the second sense renders a functioning biological organism less valuable or less of a "person."

The argument contained in the abortion rights "distinguished scientists and physicians" Webster amicus brief is clearly disingenuous. *See* Amicus Curiae Brief of 167 Distinguished Scientists and Physicians, including 11 Nobel Laureates, in Support of Appellees, at 3-7, Webster v. Reproductive Health Serv., 109 S.Ct. 3040 (1989) (No. 88-605). The scientists repeatedly claim that science cannot determine when life begins, and even whether it begins before birth. In their brief, the scientists deliberately use the term "human" in a value-oriented sense. They then triumphantly declare that humanness is a question that science cannot answer. *Id.* This approach appears to constitute a deliberate misunderstanding of the question the scientists are being asked. We want to know if the fetus is human in the scientific sense: is it of our species? The answer to that question, as Tribe has previously acknowledged, is clear enough: "what other form or species of life could it be?" AMERICAN CONSTITUTIONAL LAW, *supra* note 5, at 1348-49. The scientists also should be able to state whether the fetus is alive. Finally, the scientists can at least state the underlying facts relevant to the question of "individuality." It seems clear that at least by the fetal stage, there exists in the scientific sense an individual live organism of the human species. It also seems clear that scientists have traditionally marked fertilization as the process that "give[s] rise to a new organism. . . " *see, e.g.*, T. SADLER, *supra* note 143, at 3, although some may argue that in a stricter sense individuality is not fully achieved until a few weeks later. The amici scientists ought to be able to acknowledge these facts honestly, while leaving to others the value judgment of whether this organism's lack of development renders it less valuable or less human in some philosophical, political, legal, or theological sense.

157. *See* Roe v. Wade, 410 U.S. 113, 158, 163 (1973). The protections afforded the viable fetus have actually been more illusory than real. *See* Smolin, *supra* note 140, at 158-62.

158. *See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 778 (1986) (Stevens, J. concurring)(quoted with approval in Webster v. Reproductive Health Services, 109 S. Ct. 3040, 3075 (1989) (Blackmun, J., dissenting)).

definitions of personhood permit some forms of individual human life to be denied civil or human rights.

One of the strengths of the pro-life position is its unwillingness to accept a definition of personhood that excludes some forms of individual human life. Restrictive definitions of personhood are always open to reinterpretation, and thus are subject to the political, philosophical or theological proclivities—and the raw self-interest—of those in power. The legal decision that the fetus—indisputably an individual, human life—is not a person seems cut from the same cloth that gave us *Dred Scott v. Sanford*.[159]

Tribe makes no explicit effort in *Abortion* to truly join the debate about the merits of restrictive versus nonrestrictive definitions of "personhood." Indeed, it is often unclear precisely the sense in which he uses the term. However, one can infer from *Abortion* and Tribe's other writings that his premises about personhood and autonomy place him in a dilemma. In particular, he clearly believes that prohibiting abortions profoundly detracts from the personhood of women.[160] Personhood for Tribe necessarily involves the right to disassociate. His solution, which he has called "tragic,"[161] then becomes clear. We must guarantee to women full personhood by giving them the right to disassociate from the fetus, even if it kills. The previable fetus anyway is less of a "person," or is a nonperson, because it lacks the capacity to disassociate.[162] Abortion rights are thus necessary to maximize the rights of true persons, and infringe only the rights of partial or potential persons.

Tribe's solution, of course, is only tenable for those who believe that the right to disassociate is essential to personhood. There is a competing view of personhood that views the uniquely dependent fetus, who cannot disassociate from her mother, as no less a person than the President of the United States. Similarly, requiring women not to disassociate from their unborn children can be viewed as enhancing her human dignity, or her personhood, or at least as not detracting from it. Personhood, in other words, is not about disassociating and absolute choice. It is about the beauty of fulfilling the human life cycle, which demands that we at various times in our lives be profoundly needy or profoundly needed, and therefore

159. 60 U.S. 393 (1856). *See* Rice, *The Dred Scott Case of the Twentieth Century*, 10 HOUS. L. REV. 1059 (1973); Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed, and the Role*, 20 GA. L. REV. 815, 832 (1986)(pro-life interpretation of *Roe v. Wade* as *Dred Scott* case of our time is plausible and significant).

160. *See, e.g.*, L. TRIBE, *supra* note 1, at 128 (granting fetal personhood renders women less than full persons); AMERICAN CONSTITUTIONAL LAW, *supra* note 5, at 1358 ("[r]espect for the fetus may not be bought by denying the value of the woman").

161. AMERICAN CONSTITUTIONAL LAW, *supra* note 5, at 1358.

162. *Id.* at 1357.

bound to one another in love. Gender equality, moreover, is not about being the same as one another, or equally able to disassociate. Rather it is about being accorded an equal share of human dignity and worth even if we at times perform uniquely gendered functions within the human drama of love and dependency.

These two views of personhood painfully divide our nation into two separate societies, each striving to constitute the true American ideal. The academy, and in particularly the legal academy, barely notices the conflict because it is almost entirely committed to one side. Thus, Tribe characteristically assumes that his reader will share his basic commitment to autonomy and disassociation rights—after all, doesn't everybody? Indeed, Tribe can barely believe that the true pro-lifer exists. He views their concern for fetal life as surrogate for a desire to "punish" women for sexual freedom, or some such dubious motive.[163] Of course, it is true that those who care profoundly for fetal life disproportionately accept gender roles. On the other hand, there is a corollary truth that those who care little for fetal life disdain the limitations implicit in the process of human reproduction. One does not engage in debate by caricaturing pro-lifers as sexists. The debate, after all, is in part over the true definition of sexism. Measuring female sexuality by male sexuality is arguably more discriminatory or sexist than accepting as a good a mother's moral and legal obligation to her unborn child. One realizes in sadness, after studying Tribe's book, that the dialogue has not even begun.

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163. *See* L. TRIBE, *supra* note 1, at 132, 229-38. Tribe characterizes those who believe that a woman is "responsible" for the consequences of consensual sexual intercourse, including gestating an unborn child, as desiring to "punish" a woman because she is "guilty" of engaging in sexual intercourse. *See id.* This is clearly unfair: many people may believe there is nothing immoral about the sexual act, and still believe that consensual sex acts create the responsibility to care for, or at least not kill, a child that results. Even those who believe that sexual intercourse outside of marriage is immoral, do not necessarily view pregnancy as "punishment," but rather as "responsibility:" pregnancy after all can follow either the moral act of marital intercourse or the immoral act of fornication. Indeed, it is more characteristic of abortion rights advocates to portray pregnancy negatively as a physical invasion. *Id.* at 103. Pregnancy has even been characterized as an illness for which abortion is one of several appropriate treatments. *See* W. HERN, *supra* note 70, at 4, 8-9 (1984). It is more characteristic of the pro-life community to recognize pregnancy and childbirth essentially as blessings, even under difficult circumstances.